SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

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IN CIRCUIT COURT OF SEBASTIAN COUNTY, FORT SMITH DISTRICT

OSSIE MCCRAY, Plaintiff,

vs.

LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE, Defendant

COMPLAINT AT LAW—Filed July 14, 1932

Comes the plaintiff herein, Ossie McCray, and complains of the Life and Casualty Insurance Company of Tennessee, and for cause of action, alleges:

That said defendant is a corporation of the State of Tennessee, engaged in the business of life insurance, and has qualified to do a life insurance business in the State of Arkansas, and has complied with the laws of the State of Arkansas, as a condition of doing life insurance business in said State.

That Jonas McCray was a resident of Fort Smith, Arkansas, and did obtain a policy of life insurance in said Company on the 3rd day of November, 1930, wherein the company agreed in consideration of the payments therein made and the semi-annual premium of $8.52, payable on the first days of November and May in each year, to pay upon the receipt of due proof of death of said Jonas McCray and the surrender of said policy the sum of $500 to Ossie McCray, wife of the insured, the beneficiary therein named, if living.

The original of said policy is in the possession of this plaintiff, and a copy thereof in the records of the defendant, and the original is held subject to the inspection of the defendant and the Court.

[fol. 3] That Jonas McCray died May 10, 1932. That he had paid the last semi-annual payment due on May 1st, 1932, in the sum of $8.52, and an official receipt therefor was issued by the defendant company, and is in the possession of the plaintiff.

That immediately after the death of the said Jonas McCray, the plaintiff made due proof of said death and delivered said policy to the defendant's agent for the purpose of surrender on the payment of said sum of $500.

That thereafter, the defendant denied liability for the payment of said $500. That the plaintiff has made demand upon the defendant for payment of said sum, and the defendant has wholly failed to do so.

That the defendant is doing business in the Fort Smith District of Sebastian County, Arkansas, and D. E. Bryan is the duly licensed agent, and is District Manager of the defendant, having an office in the City of Fort Smith, Arkansas.

Wherefore, the plaintiff prays judgment against the defendant for the sum of $500, with interest from the date of the receipt of proof of death by the defendant, and for a reasonable attorneys' fees and 12% penalty, and all other and further relief which the plaintiff is entitled to receive.

Hill, Fitzhugh & Brizzolara, Attorneys for Plaintiff.

[File endorsement omitted.]

(Summons issued on the 14th day of July, 1932, and returned duly served on the 14th day of July, 1932.)

[fol. 4] In Circuit Court of Sebastian County

[Title omitted]

Answer—Filed Aug. 25, 1932

Comes now the above named defendant, and for its answer to the complaint of the plaintiff, alleges and states:

That it is provided by the terms, provisions and conditions of the policy sued on herein, as follows:

"If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the Company shall be limited to the amount of the premiums paid hereon."

It is further provided by the policy sued on herein that:

"This policy may be reinstated at any time after default in the payment of any premiums, unless the cash value has been paid or the extension period has expired, upon production of evidence of insurability satisfactory to the company, the payment or reinstatement of any indebtedness to the company hereon, and the payment of overdue premiums, with interest at six per cent per annum."

That the policy sued on herein was issued and took effect on the 3rd day of November, 1930, but that said policy lapsed thirty days after the first day of May, 1931, by reason of the failure of said Jonas McCray, now deceased, or anyone for him, to pay the premium due on said policy, in [fol. 5] the sum of $8.52, on the first day of May, 1931, it being provided by the terms of said policy as follows:

"A grace of one calendar month (of not less than thirty days), shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If any premium or installment of premium be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided."

That said policy of insurance was reinstated under the reinstatement provision of said policy, as hereinabove set out, on the first day of August, 1931.

That on or about the 10th day of May, 1932, the insured, Jonas McCray, committed suicide, and died by his own hand, as a result of phenol poisoning, caused by the said insured wilfully, intentionally and knowingly taking said poison for the purpose of taking his own life, and which resulted in the death of the said Jonas McCray, as aforesaid.

That upon the lapse of said policy, as hereinabove alleged, the policy sued upon became void. That the reinstatement of said policy of insurance effected a new contract between the defendant — the said Jonas McCray, said new contract being on the same terms, provisions and conditions as the lapsed contract of insurance. That the suicide clause above set forth upon such renewal commenced

to run again, and the said Jonas McCray took his own life, as aforesaid, within one year from the date of said new contract, and that by reason of said fact, and said suicide clause, the liability of this defendant is limited to the [fol. 6] amount of the premiums paid by the said Jonas McCray, under said policy of insurance and renewal thereof.

The defendant offers herewith to confess judgment for the amount of said premiums paid by the said Jonas McCray, in the sum of $34.08, and tenders herewith and deposits with the Clerk of this Court the sum of $34.08, which said sum is the total amount of premiums paid by the said Jonas McCray on the policy of insurance herein sued upon and the renewal thereof. That heretofore, on the 18th day of June, 1932, the defendant tendered to the plaintiff said sum of $34.08, which said tender was made prior to the filing of the suit herein, but that said tender was refused and declined by the plaintiff.

That an exact copy of the policy of insurance sued on herein is hereto attached, marked Exhibit "A", and made a part of this complaint, as though set forth at length in this complaint.

Wherefore, premises considered, defendant prays that the plaintiff take nothing by reason of her suit herein, beyond the amount of said premiums tendered and paid herewith, and that the defendant recover its costs herein laid out and expended, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

(Here follows Exhibit "A" to Answer, side folios 6a, 6b, 6c and 6d)

EXHIBIT "A" TO ANSWER

INTERMEDIATE WHOLE LIFE POLICY

INCORPORATED UNDER THE LAWS OF THE STATE OF TENNESSEE

LIFE AND CASUALTY

Insurance Company

OF TENNESSEE

NUMBER | AMOUNT | PREMIUM | AGE

HOME OFFICE
LIFE AND CASUALTY BUILDING

NASHVILLE, TENNESSEE

In Consideration of the application for this Policy, copy of which is attached hereto and made a part hereof, and the payment of the Semi-Annual premium of $8.52 Dollars Semi-Annually on the First day of November and May in each year during the continuance of this Policy, hereby promises to pay at its Home Office in the City of Nashville, Tennessee, Five Hundred DOLLARS, less any indebtedness due the Company and any unpaid portion of the premium for the then current policy year ... surrender of this Policy properly receipted immediately upon receipt of due proof of the death of

SPECIMEN

less any indebtedness due the Company and any unpaid portion of the premium for the then current policy year upon surrender of this Policy properly receipted immediately upon receipt of due proof of the death of

Jonas McCray
The Insured

of Fort Smith in the County of Sebastian State of Arkansas,

unto Ossie McCray Wife of the insured
The Beneficiary

if living, otherwise to the executors, administrators or assigns of the Insured.

GENERAL PROVISIONS

Only the President, Vice-President, Secretary, Assistant Secretary, Actuary, or Treasurer has power on behalf of the Company to make or modify this contract.

This Policy and the application therefor shall constitute the entire contract, and all statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defense of a claim under this Policy unless contained in the written application herefor, copy of which is endorsed hereon or attached hereto.

The first year's insurance under this Policy is term insurance purchased by the whole or part of the premium received during the first policy year. The reserve to be held for the protection of this Policy shall be the reserve according to the New York Standard Intermediate Table of Mortality, with three and one-half per cent. interest. (Illinois Standard.)

This Policy is subject to the conditions and provisions stated on this and the following pages hereof, which form a part of this contract as fully as if recited at length over the signatures hereto affixed, and in the event that such conditions or provisions are not in all respects observed, this Policy shall become void and all rights thereunder forfeited.

In Witness Whereof, The Life and Casualty Insurance Company of Tennessee has caused this Policy to be signed by its President and Secretary, at its Home Office in the City of Nashville, Tennessee, this 3rd. day of November nineteen hundred and thirty.

SPECIMEN COPY

Edward E. Loskamp
President

SPECIMEN COPY

Secretary

Examined and countersigned

INTERMEDIATE WHOLE LIFE POLICY. Form 92
5-20-31—3000

Brandon-Nashville

Exhibit "A"

CONDITIONS

PREMIUMS. This Policy shall not take effect until the first premium shall have been paid in cash and this contract delivered and accepted during the lifetime and good health of the Insured. If the premium is paid in cash when application is taken, the risk shall be assumed as of date of the application subject to all the terms and conditions of the Policy.

All premiums are payable in advance at said Home Office or to an agent of the Company upon delivery, on or before the date due, of a receipt signed by the President, Secretary, or Treasurer of the Company and countersigned by said agent. Except as herein provided the payment of a premium or instalment thereof shall not maintain this Policy in force beyond the date when the next premium or instalment of premium is payable.

GRACE. A grace of one calendar month (of not less than thirty days), shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If any premium or instalment of premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

INCONTESTABILITY. This Policy shall be incontestable after it shall have been in force during the lifetime of the Insured for two years from its date of issue, except for non-payment of premiums and except for violation of the conditions of the Policy relating to military and naval services in time of War. But where the Statute of the State in which this Policy is written contains a different provision on this subject than the above, the language of such Statute shall be substituted for this clause.

AGE. If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid hereon would have purchased at the correct age.

SUICIDE. If within from the date of issue of this Policy the Insured shall, whether sane or insane, die by his own hand, the liability of the Company shall be limited to the amount of the premiums paid hereon.

ASSIGNMENT. No assignment of this Policy shall be binding upon the Company unless it be executed upon the blanks furnished by the Company and filed with the Company at its Home Office in the City of Nashville, Tennessee. The Company assumes no responsibility as to the validity of any assignment.

CHANGE OF BENEFICIARY. The Insured may, without the consent of the beneficiary, receive any benefit, exercise every right and enjoy every privilege conferred by this Policy. Provided this Policy be not assigned, the Insured may at any time and from time to time change the beneficiary hereunder, by written request upon the Company's forms, such change to take effect upon the written endorsement of the same upon the Policy by the Company.

NON-FORFEITURE PROVISIONS. After three full annual premiums shall have been paid, if default be made of any payment of any subsequent premium, this Policy shall automatically at time of lapse be unconditionally commuted to non-forfeitable paid-up insurance as provided below, payable at the same time, and on the same terms, save as to amount, as this Policy.

Within ninety days after said commutation, the Insured, in lieu of this automatic unconditional non-forfeitable paid-up insurance, may upon written demand addressed to the Home Office of the Company receive either of the following options:

1. Receive the cash surrender value of this Policy, less any indebtedness to the Company hereon. The

Within ninety days after said commutation, the Insured, in lieu of this automatic unconditional non-forfeitable paid-up insurance, may upon written demand addressed to the Home Office of the Company receive either of the following options:

1. Receive the cash surrender value of this Policy, less any indebtedness to the Company hereon. The cash surrender value shall be the reserve on this Policy at the date of default, less a surrender charge, which in no case shall be more than two and one-half per cent. of the sum insured; or

2. Receive extended insurance from date of default for an amount equal to the face of this Policy, for such term in years and months from the date of default as is provided below, but without the right to loans and cash surrender values.

The amount of the paid-up insurance or the term for which the Insurance will be extended shall be such as the cash surrender value will purchase as a net single premium at the attained age of the Insured at the date of default according to the New York Standard Intermediate Table of Mortality, with interest at the rate of three and one-half per cent. per annum.

Any indebtedness to the Company under this Policy will be deducted from the cash surrender value; and such indebtedness will also reduce the amount of paid-up insurance, or the amount which is continued as extended insurance, in such ratio as the indebtedness bears to the cash surrender value at due date of premium in default.

CASH LOANS. At any time after three full years' premiums shall have been paid in cash, and while this Policy is in full force, the Company will loan on the sole security of this Policy, upon legal assignment of the same as collateral security, the cash value hereunder, any indebtedness to the Company and interest on the amount loaned to the end of the current policy year being first deducted. Interest at the rate of six per cent. on such loans shall be payable annually in advance, and if not paid when due, shall be added to the amount of the loan and bear an interest charge.

It is especially provided that the Company shall have the right to defer any loan under this Policy, or to defer the granting of any cash surrender value under this Policy for a period not exceeding sixty days after application for such loan or cash surrender value shall have been made.

Failure to repay a Policy loan or premium loan, or to pay interest thereon, shall not avoid the Policy unless the total indebtedness thereon, including accrued interest, shall equal or exceed the loan value at the time of such failure, nor until one month after notice has been mailed by the Company to the last known address of the Insured and Assignee of record at the Home Office of the Company, if any.

MILITARY AND NAVAL SERVICE. The liability of the Company shall be limited to the reserve on this Policy, or to one-fifth of the amount payable hereunder on the death of the Insured, whichever amount is the greater, if the Insured shall engage in military or naval service in time of war without securing a permit to be signed by an executive officer of the Company, and paying such extra premium as the Company may fix to cover the hazard. The extra premiums charged for such permits in excess of the amount necessary to cover the extra hazard shall be returned to the policyholders contributing same.

AVIATION. If within two years from the date of issue of this Policy the Insured shall die in consequence of having been engaged in an aerial flight, or any form of aviation, the liability of the Company shall be limited to the amount of the premiums paid hereon. But where the Statute of the State in which this Policy is written contains a different provision on this subject than the above, the language of such Statute shall be substituted for this clause.

PREMIUM LOANS. Upon request of the Insured, and Assigns, if any, made prior to default in premium payment and remaining unrevoked the premiums thereafter falling due and not paid will be charged as a loan against this Policy with interest as in the case of Cash Loans, provided the then Cash Surrender Value be sufficient to cover such loan. Any premium loan may be repaid at any time.

REINSTATEMENT. This Policy may be reinstated at any time after default in the payment of any premium, unless the Cash Value has been paid or the extension period has expired; upon production of evidence of insurability satisfactory to the Company, the payment or reinstatement of any indebtedness to the Company hereon, and the payment of overdue premiums with interest at six per cent. per annum.

SURRENDER OPTIONS FOR $1000 INSURANCE

The Options below stated, except the term of the Extended Insurance, which is not affected by the amount of the Policy, apply to a Policy of $1,000—this Policy being for $.....the various Options at the end of any year will be respectively..... times the amounts stated for that year.

	COLUMN 1	COLUMN 2	COLUMN 3	
FOR END OF YEAR	CASH OR LOAN VALUE	PAID-UP POLICY	EXTENDED INSURANCE	
			YEARS	MONTHS
1	None	None	None	1
2	None	None	None	2

The Options below stated, except the term of the Extended Insurance, which is not affected by the amount of the Policy, apply to a Policy of $1,000—this Policy being for $.....the various Options at the end of any year will be respectively..... times the amounts stated for that year.

FOR END OF YEAR	COLUMN 1 CASH OR LOAN VALUE	COLUMN 2 PAID-UP POLICY	COLUMN 3 EXTENDED INSURANCE	
			YEARS	MONTHS
1	None	None	None	1
2	None	None	None	2
3	$	$		
4	$	$		
5	$	$		
6	$	$		
7	$	$		
8	$	$		
9	$	$		
10	$	$		
11	$	$		
12	$	$		
13	$	$		
14	$	$		
15	$	$		
16	$	$		
17	$	$		
18	$	$		
19	$	$		
20	$	$		

The figures contained in the above table represent the maximum amounts available, assuming that premiums have been paid in full for the number of years stated in the table, and that there is no indebtedness to the Company hereon.

WHEN WRITING ABOUT THIS POLICY
DO NOT FAIL TO GIVE ITS NUMBER

No. _____

LIFE AND CASUALTY

Insurance Company

OF TENNESSEE

HOME OFFICE
LIFE AND CASUALTY BUILDING

NASHVILLE, TENNESSEE

NAME OF INSURED

_____

AMOUNT $ _____

DATE _____

KIND _____

_____ PREMIUM $ _____

PREMIUM DUE _____ DAY OF _____

_____ IN EACH YEAR

INTERMEDIATE WHOLE LIFE POLICY

SPECIMEN COPY

REGISTER OF CHANGE OF BENEFICIARY

NOTE.—No change, designation or declaration shall take effect until endorsed on this Policy by the Company at the Home Office.

DATE ENDORSED	BENEFICIARY	ENDORSED BY

REGISTER OF POLICY LOAN

AMOUNT OF LOAN	DATE OF LOAN	ENDORSED BY

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[fol. 7] IN CIRCUIT COURT OF SEBASTIAN COUNTY, OCTOBER TERM, 1932

No. 7085.

OSSIE McCRAY, Plaintiff,

v.

LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE, Defendant

JUDGMENT—October 5, 1932

This cause coming on to be heard, the plaintiff appearing by her attorneys, Hill, Fitzhugh & Brizzolara, and the defendant appearing by its attorneys, Cravens & Cravens, and counsel announcing ready for trial, and that a jury was waived, and that the case be submitted upon the pleadings, and agreed statement of facts this day filed.

Thereupon the Court proceeded to hear and determine said cause, and doth find that the policy sued upon was in force at the time of the death of Jonas McCray on May 10th, 1932, and that due proof of loss was made and received by the defendant on the 20th day of May, 1932, and that defendant denied liability upon said policy, except for the amount of premiums paid, which was tendered and declined.

The Court finds that the plaintiff is entitled to recover the face of the policy, $500, with interest from the 20th day of May, 1932, amounting to $11.25, and that she is entitled to recover 12% penalty, amounting to $60.00, and Attorneys' fee, and after hearing evidence on said subject, the Court finds that $100 for services in the Circuit Court and $100 for services in the Supreme Court are reasonable attor-
[fol. 8] neys' fees to be taxed as costs, and the defendant expressing an intention to appeal the case, the Court finds that the attorneys' *fees to be taxed as costs, and the defendant expressing an intention to appeal the case, the Court finds that the attorneys'* fee of $200 should be taxed as costs.

It is by the Court considered, ordered and adjudged that the plaintiff, Ossie McCray, have and recover of and from the defendant, Life and Casualty Insurance Company of

Tennessee, the sum of $771.25, and that she may have execution therefor, provided, however, in the event the defendant pays the judgment without appealing to the Supreme Court, it will stand reduced by the sum of $100.

[fol. 9] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed Oct. 5, 1932

Comes now the above named defendant, and moves the Court to set aside the judgment of the Court rendered herein on the 5th day of October, 1932, and for grounds therefor states:

1. Because said judgment is contrary to law.

2. Because said judgment is contrary to the agreed statement of facts filed herein.

3. Because the Court erred in rendering judgment in favor of the plaintiff.

4. Because the Court erred in holding that the one year suicide period ran from the date of the original policy sued on herein.

5. Because the Court erred in holding that the suicide clause herein did not commence to run anew from the date of the reinstatement of the policy sued on herein.

6. Because the Court erred in holding that the plaintiff was entitled to recover for the death of Jonas McCray resulting from suicide, where said suicide occurred after the reinstatement of the policy sued on, and before the expiration of one year from said date.

Wherefore, premises considered, plaintiff prays that the judgment of the Court rendered herein, as aforesaid, be set aside and held for naught, and that it be granted a new [fol. 10] trial herein, and for all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 11] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.—October 5, 1932

On this day comes the defendant and files motion for a new trial herein, and said motion now coming on to be heard, the parties appear by their respective attorneys. The Court, after hearing argument of counsel, being well and sufficiently advised in the premises, doth overrule said motion, to which action of the Court in overruling said motion for a new trial, the defendant at the time saved its exceptions and is by the Court allowed 60 days in which to prepare and file its Bill of Exceptions; and the defendant prays and is granted an appeal to the Supreme Court of the State of Arkansas.

[fol. 12] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

SUPPLEMENTAL MOTION FOR NEW TRIAL—Filed Oct. 18, 1932

Comes now the above named defendant, and moves the Court to set aside the judgment of the Court with reference to penalty and attorney's fee rendered herein on the 5th day of October, 1932, and for grounds therefor, states:

1. That the Court erred in allowing a penalty in favor of the plaintiff and against the defendant.

2. Because the Court erred in allowing, in favor of the plaintiff and against the defendant, a fee for plaintiff's attorneys herein.

3. Because the Court erred in allowing a penalty in favor of the plaintiff and against the defendant, for the reason that the defendant, in resisting plaintiff's claim, had reasonable grounds and cause therefor, and that the defendant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of vexation or delay, but upon a well founded belief that the plaintiff was not en-

titled to recover in this cause, and that said penalty was taxed against the defendant solely by reason of the fact that the plaintiff recovered the amount sued for, and that said penalty was allowed as aforesaid without regard to the reasonableness or unreasonableness of the defendant's [fol. 13] refusal to pay, and without regard to whether or not the refusal to pay was vexatious, and without regard to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law and the facts, that the plaintiff was not entitled to recover, and that the Court, in allowing said penalty under the circumstances aforesaid, deprived the defendant of the equal protection of the law, and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America, and contrary to Article 2, Paragraph 8 of the Constitution of the State of Arkansas, said allowance of penalty having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the Statutes of the State of Arkansas, and which said Section, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount sued for, and without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or vexatious, and without regard to whether the defendant's refusal to pay was based upon a well founded belief, reasonably entertained, that the plaintiff was not entitled to recover, and that said Section of the Statutes aforesaid, as so construed, deprives the defendant of due process of law and of the equal protection of the laws, contrary to the provisions of the Constitution of the United States as aforesaid, and of the Constitution of the State of Arkansas, as hereinabove set forth.

4. Because the Court erred in allowing an attorney's fee in favor of the plaintiff and against the defendant, for the reason that the defendant, in resisting plaintiff's claim, [fol. 14] had reasonable grounds and cause therefor, and that the defendant, in refusing to pay said claim, did not act arbitrarily or unreasonably, or for the purpose of vexation or delay, but upon a well founded belief that the plaintiff was not entitled to recover in this cause, and that said attorney's fee was taxed against the defendant solely by

reason of the fact that the plaintiff recovered the amount sued for; and that said attorney's fee was allowed as aforesaid without regard to the reasonableness or unreasonableness of the defendant's refusal to pay, and without regard to whether or not the refusal to pay was vexatious, and without regard to whether or not the defendant's refusal to pay was based upon a well founded belief, reasonably entertained under the law and the facts, that the plaintiff was not entitled to recover, and that the Court in allowing said attorney's fee under the circumstances aforesaid, deprived the defendant of the equal protection of the law, and of its property without due process of law, contrary to the 14th Amendment to the Constitution of the United States of America, and contrary to Article 2, Paragraph 8 of the Constitution of the State of Arkansas, said allowance of attorneys' fee having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the Statutes of the State of Arkansas, and which said Section, as construed by the Supreme Court of Arkansas, *and which said Section, as construed by the Supreme Court of Arkansas,* authorizes the allowance of an attorney's fee in favor of the plaintiff merely in the event that the plaintiff is successful in recovering the amount used for, and without regard to whether or not the defendant's refusal to pay was reasonable or unreasonable, proper or vexatious, [fol. 15] and without regard to whether the defendant's refusal to pay was based upon a well founded belief, reasonably entertained, that the plaintiff was not entitled to recover, and that said Section of the Statutes aforesaid, as so construed, deprives the defendant of due process of law and of the equal protection of the laws, contrary to the provisions of the Constitution of the United States as aforesaid, and of the Constitution of the State of Arkansas, as hereinbefore set forth.

Wherefore, premises considered, defendant prays that the judgment for penalty and attorney's fee rendered herein be annulled, set aside and held for naught, and that the defendant be granted a new trial with reference to the same, and have all other proper relief.

Cravens & Cravens, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 16] IN CIRCUIT COURT OF SEBASTIAN COUNTY

[Title omitted]

ORDER OVERRULING SUPPLEMENTAL MOTION FOR NEW TRIAL —October 18, 1932

Comes the defendant and files supplemental motion for a new trial herein, and said motion now coming on to be heard, the parties appear by their respective attorneys. The Court, after hearing argument of counsel, being well and sufficiently advised in the premises, doth overrule said motion, to which action of the Court in overruling said motion for new trial, the defendant at the time excepted, and prays an appeal to the Supreme Court, which is granted; and the defendant is allowed the time heretofore indicated on its original motion in which to prepare and file its Bill of Exceptions herein.

[fol. 17] IN CIRCUIT COURT OF SEBASTIAN COUNTY, FORT SMITH DISTRICT

No. 7085

OSSIE McCRAY, Plaintiff,

vs.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Defendant

Bill of Exceptions

Be it remembered that on the 5th day of October, 1932, the same being a day of the regular October 1932 term of this court, the above entitled cause having been reached on its regular call, the plaintiff appeared by her attorneys, Hill, Fitzhugh & Brizzolara, and the defendant by its attorneys, Cravens & Cravens, and announced ready for trial. Thereupon a jury was waived by the respective parties, through their attorneys as aforesaid, and this cause was submitted to the court sitting as a jury upon the following agreed statement of facts, which said agreed

statement of facts was agreed to an- signed by the parties hereto on the 21st day of September, 1932, and filed in this cause on this day, and which said agreed statement of facts is in words and figures as follows, to-wit:

AGREED STATEMENT OF FACTS

It is agreed by and between Hill, Fitzhugh & Brizzolara, attorneys for the plaintiff in the above entitled cause, and Cravens & Cravens, attorneys for the defendant in said cause, that the same will be submitted to the court upon the following agreed statement of facts, which are stipulated to be the facts in the cause necessary to a proper determination thereof.

[fol. 18] I

That on the 3rd day of November, 1930, the defendant executed its policy of life insurance to Jonas McCray in the sum of $500, payable in case of the death of the said Jonas McCray to the above named plaintiff as the beneficiary named in said policy. That said policy is dated November 3, 1930, and was issued subject to the terms, provisions and conditions in said policy set forth, which, so far as material to this cause, are hereinafter set out. That said policy was issued in consideration of a semi-annual premium of $8.52, payable on the first day of November and May in each year. The policy was delivered in Fort Smith, Arkansas, to Jonas McCray after the date of said policy and while the said Jonas McCray was in good health, and that the first premium on said policy was paid at the date of its delivery. That said policy of insurance is an Arkansas contract.

II

That said Jonas McCray paid all the premiums on said policy except the premium due on the first day of May, 1931, and that the premium due on the first day of May, 1931, was not paid on the date thereof, or during the period of grace provided for in said policy.

III

That it is provided in said policy as follows:

"A grace of one calendar month (of not less than thirty days), shall be granted for the payment of every premium

after the first, during which time the insurance shall continue in force. If any premium or installment of premium be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided."

[fol. 19] That it is further provided by the policy issued as aforesaid and sued on herein, as follows:

"This policy may be reinstated at any time after default in the payment of any premium, unless the cash value has been paid or the extension period has expired, upon production of evidence of insurability satisfactory to the company, the payment or reinstatement of any indebtedness to the company herein, and the payment of overdue premiums, with interest at six per cent per annum."

IV

That said policy issued as aforesaid and sued on herein, and after the default in the payment of the premium due on the first day of May, 1931, was by the said Jonas McCray reinstated under the provisions of the policy aforesaid, said reinstatement having taken place on the 15th day of July, 1931, and that the premiums thereafter accuring on November 1, 1931, and May 1, 1932, were fully paid by the said Jonas McCray.

V

That the policy issued as aforesaid and sued on herein provides as follows:

"If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

VI

That the said Jonas McCray committed suicide and died by his own hand on the 10th day of May, 1932, less than one year after the reinstatement of said policy as aforesaid.

VII

[fol. 20] That prior to the institution of this suit, the defendant offered to pay the plaintiff the sum of $34.00, which sum is the total amount of premiums paid on the policy aforesaid, and that said offer of payment was refused by the plaintiff.

In witness whereof the respective attorneys aforesaid have hereunto set their hands this 21st day of September, 1932.

(Signed) Hill, Fitzhugh & Brizzolara, Attorneys for Plaintiff. (Signed) Cravens & Cravens, Attorneys for Defendant.

Thereupon the plaintiff offered proof on the question of a reasonable attorneys' fee to be allowed plaintiff's attorneys herein in the event judgment was rendered for the plaintiff, and the evidence introduced tended to show that a reasonable allowance for plaintiff's attorneys herein is the sum of $100, and that a reasonable fee for plaintiff's attorneys, in the event this suit is appealed to the Supreme Court of Arkansas, is an additional fee of $100.

The above agreed statement of facts and the evidence with reference to attorneys' fee, as aforesaid, and that demand was made prior to suit, was all the evidence heard in this cause.

Thereupon the plaintiff moved the court to render judgment in favor of the plaintiff for the sum of $500, with interest at the rate of 6% per annum from the 20th day of May, 1932, and for a statutory penalty in the sum of $60.00, and for an attorneys' fee in the sum of $100 for services rendered in this court, and for an additional allowance of fee in the sum of $100 for services to be rendered in the [fol. 21] Supreme Court of Arkansas, if this cause should be appealed to said Court. And thereupon the defendant moved the court to render judgment in favor of the defendant, adjudging that the plaintiff take nothing by reason of her suit herein, and that the defendant recover its costs herein laid out and expended.

The court, being well and sufficiently advised, and after hearing the argument of counsel, found for the plaintiff

in the sum of $500 on the policy sued on herein, said sum to bear interest from the 20th day of May, 1932, until paid, and for an additional amount in the sum of $60.00, being 12% of the policy sued on herein, and for an additional amount for plaintiff's attorneys for their services rendered in this cause in this court, and for an additional sum of $100 for plaintiff's attorneys for services in the Supreme Court of Arkansas, if this cause be appealed to said court, and the court thereupon rendered judgment accordingly, to which action of the court the defendant at the time excepted.

Thereafter, on the same day and in apt time, the defendant filed the following motion for new trial, which said motion for new trial is in words and figures as follows, to-wit:

Motion for new trial omitted; printed side page 9 ante.

[fol. 22] And said motion for new trial having been presented to the court, the same was overruled, to the overruling of which the defendant saved its exceptions and prayed an appeal to the Supreme Court of Arkansas, which said appeal was granted, and the defendant allowed sixty days within which to prepare, present and file its bill of exceptions herein. Thereafter, on the 18th day of October, 1932, by agreement of counsel, the defendant filed the following supplemental motion for new trial, which said supplemental motion for new trial is in words and figures as follows, to-wit:

[fols. 23-25] Supplemental motion for new trial omitted; printed side page 12 ante.

[fol. 26] And said supplemental motion for new trial being presented to the court on the 18th day of October, 1932, the same was on the same day overruled, and to the overruling of which motion the defendant at the time saved its exceptions and prayed an appeal to the Supreme Court of Arkansas, which was granted, and the defendant allowed time to file bill of exceptions herein within the period heretofore granted upon the overruling of the original motion for new trial.

AGREEMENT AS TO BILL OF EXCEPTIONS

It is agreed by and between counsel of record for the plaintiff and defendant in this cause that the foregoing bill of exceptions contains all of the evidence and agreed facts heard or offered in the trial of said cause, and all exceptions thereto; the motions for new trial and the exceptions thereto, and all proceedings had and done in the trial of this cause, and that the same is in all things correct. It is further agreed between counsel for the parties to said cause that said bill of exceptions, when filed by the Clerk of the Sebastian Circuit Court for the Fort Smith District, shall become a part of the record in this cause, as fully, completely and effectually as if approved, signed and ordered filed by order of the Judge or court trying said cause.

In witness whereof said counsel have hereunto set their hands this 25th day of October, 1932.

Hill, Fitzhugh & Brizzolara, Counsel for Plaintiff.

[fols. 27-31] Cravens & Cravens, Counsel for Defendant.

[fol. 32] [Caption omitted]

IN SUPREME COURT OF ARKANSAS

No. 2929

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant,

v.

OSSIE MCCRAY, Appellee

Appeal from Sebastian Circuit Court, Ft. Smith District

JUDGMENT—March 20, 1933

This cause came on to be heard upon the transcript of the record of the circuit court of Sebastian county, Fort Smith district, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs; and that said appellee recover of said appellant and United States Fidelity & Guaranty Company, surety in the supersedeas bond filed in this cause, the sum of five hundred and seventy-one dollars and twenty-five cents, being the face of the policy sued on with interest to the date of the judgment, and 12% statutory penalty, and the further sum of two hundred dollars, as her attorney fee, taxed as costs, and that said judgment bear interest at six per cent per annum from 5th day of October, A. D. 1932, the date and amount of said judgment.

[fol. 33] It is further considered that said appellee recover of said appellant and said surety all her costs in this Court and the court below, including the attorney fee aforesaid, and have execution thereof.

No petition for rehearing was filed.

[fol. 34] IN SUPREME COURT OF ARKANSAS

No. 174

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

v.

MCCRAY

OPINION—March 20, 1933

MCHANEY, J.:

Appellee is the beneficiary named in a policy of insurance for $500 issued by appellant on the life of her husband, Jonas McCray, dated November 3, 1930, premiums being due and payable semi-annually on May 1 and November 1. The cash premium was paid, but the premium due May 1, 1931 was not paid when due nor within the grace period. The policy provided for a grace period of 30 days for the payment of any premium after the first "during which time the insurance shall continue in force." And further: "If any premium or installment of premium be

not paid before the end of the period of grace, then this policy shall immediately cease and become void," etc. It further provided that "This policy may be reinstated at any time after default in the payment of any premiums * * * upon production of evidence of insurability satisfactory to the company, the payment or reinstatement of any indebtedness to the company hereon, and the payment of overdue premiums, with interest at six per cent per annum."

The premiums due May 1, 1931, not having been paid when due, nor within the period of grace, the policy lapsed, but on August 1, 1931, same was reinstated. Thereafter, on May 10, 1932, more than one year from the date of the policy, but less than one year from the date of reinstatement, the insured, Jonas McCray, committed suicide. The policy contained a suicide clause as follows:

[fol. 35] "If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

Proof of death was duly made and payment of the amount due under the policy demanded. Payment was refused, and this suit followed which was tried before the court on an agreed statement of facts, substantially as above set forth, resulting in a judgment against appellant for $500 with interest at 6% from May 20, 1932, 12% penalty and attorneys' fee of $100 for services in the circuit court and an additional $100 for services in the Supreme Court, if appealed to that court.

The defense in the circuit court and in this Court was and is that appellant was only liable for the premiums paid by the insured (for which amount it offered to confess judgment) for the reason, as it contends, that the clause against suicide within one year ran from the date of reinstatement of the policy, and not from the date of the policy itself. Appellant says: "If the clause began to run from the date of the original policy, the judgment of the lower court was correct." We do not understand there was ever but one policy and it bore date of November 3, 1930. Certainly there was never but one policy issued by appellant to insured. It lapsed and became void after

30 days from May 1, 1931 until August 1, 1931, during which time there was no insurance, but on the latter date the very same policy, not a new or different one, was reinstated by the payment of all delinquent premiums and furnishing evidence of insurability satisfactory to appellant. There is no room for the contention that any new or different contract or policy was in force after reinstatement. [fol. 36] By agreement between the parties a forfeiture of the policy was set aside and the same contract was reinstated. No new policy was issued and none contemplated. By the express terms of the policy it is provided that, "If within one year from the date of issue of this policy, the insured shall * * * die by his own hand the liability of the company shall be limited to the amount of the premiums paid hereon." It does not provide that the company's liability shall be thus limited if the insured shall die by his own hand within one year from the date of reinstatement, should the policy lapse. Time is to be reckoned "from the date of issue of this policy," not from the date of reinstatement, nor from the date of any other policy. No doubt appellant could have so worded its policy, but it has not seen fit to do so. We see no ambiguity in the matter, but if there were, under the settled rule of this Court, we would be bound to construe the clause most strongly against appellant.

The reinstatement clause above set out was a part of the contract giving the right so to do to the insured and could not arbitrarily be refused by appellant, if said clause were complied with. Appellant can not, by reason thereof, engraft on the contract a new condition or otherwise restrict its liability by conditions not contained therein. New York Life Ins. Co. v. Adams, 151 Ark. 123; Security Life Ins. Co. v. Leeper, 171 Ark. 77; Equitable Life Assurance Soc. v. King, 178 Ark. 293.

In the Leeper case, supra, there was a lapse by reason of failure to pay a premium, but was reinstated on application made a few days later. The application for reinstatement recited an agreement that "in the event of self-destruction, whether sane or insane, within one year from the date of approval by the company of this application [fol. 37] for reinstatement, the amount payable as a death benefit under said policy shall be equal to two annual premiums on said policy, and no more." Leeper committed

suicide within a year from the date of reinstatement, and the company defended on the ground of suicide. This court held that the case was ruled by the Adams case, supra, and said:

"The only provision in the policy now before us with respect to suicide related to the period running from the date of the original policy, and, since the policy gave an absolute right of reinstatement upon terms which did not include a new contract with reference to suicide, appellant had no right to impose that additional feature upon the insured in procuring reinstatement."

In the case now under consideration, the application for reinstatement, if one, was silent in this respect, but even had it so provided, it would not be effectual to accomplish the purpose for which appellant contends in the absence of such a provision in the policy itself.

Appellant also contends that it should not be taxed with the penalty and attorneys' fee imposed by statute because it says it defended in good faith, the question involved not having been heretofore decided by this court. As we have already seen, the question litigated had been decided, but assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. Security Ins. Co. v. Smith, 183 Ark. 254; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, 35 Fed. (2) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2) 557. This question is now settled and we decline to reconsider the matter.

Affirmed.

[fol. 38] IN SUPREME COURT OF ARKANSAS

EXCERPT FROM ORIGINAL BRIEF INSERTED AT APPELLANT'S REQUEST AS "ASSIGNMENT OF ERROR"

I

There is no evidence to support the judgment of the Court.

II

The Court erred in holding that the agreed state of facts, as a matter of law, imposed upon Appellant the liability for $500 and interest under the policy.

III

The Court erred in holding that the one-year suicide clause ran from the date of the original policy sued on herein, and in not holding that the suicide clause herein did not commence to run anew from the date of the reinstatement of the policy sued on.

IV

There is no evidence in the record to support the judgment of the Court in entering judgment against Appellant for the attorneys' fees of $100 in the Circuit Court and $100 in the Supreme Court of Arkansas in the event of an appeal or in assessing the penalty of twelve (12%) per cent or $60 against Appellant under Section 6155 of Crawford & Moses' Digest of the Statutes of the State of Arkansas.

V

The Court erred in allowing a penalty of twelve (12%) per cent or $60 in favor of the appellee and against the Appellant.

VI

The Court erred in allowing in favor of the Appellee and against the Appellant a fee for Appellee's attorneys herein, either in the Circuit Court or in the Supreme Court.

[fol. 39]

VII

The Court erred in holding that the Appellee was entitled to a judgment for the said penalty and attorneys' fees merely because judgment was given for the Appellee.

VIII

The Court erred in allowing a penalty or attorneys' fees in favor of the Appellee and against the Appellant, for the reason that the Appellant, in resisting Appellee's claim, had reasonable grounds and cause therefor, and that the Appellant in refusing to pay said claim did not act arbitrarily or unreasonably, or for the purpose of vexation or delay, but upon a well founded belief that the Appellee was not entitled to recover in this cause, and that said penalty and attorneys' fees are taxed against the Appel-

lant solely by reason of the fact that the Appellee recovered the amount sued for, and that said penalty and attorneys' fees were allowed as aforesaid, without regard to the reasonableness or unreasonableness of the Appellant's refusal to pay, and without regard to whether or not the Appellant's refusal to pay was based upon a well founded belief, reasonably entertained under the law and the facts, that the Appellee was not entitled to recover, and that the Court, in allowing said penalty and attorney's fees under the circumstances aforesaid, deprived the Appellant of the equal protection of the law, and of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States of America, and contrary to Article 2, Paragraph 8, of the Constitution of the State of Arkansas, said allowance of penalty and attorneys' fees having been fixed by the Court under Section 6155 of Crawford & Moses' Digest of the [fol. 40] Statutes of the State of Arkansas, and which said section, as construed by the Supreme Court of Arkansas, authorizes the allowance of a penalty and attorneys' fees in favor of the Appellee merely in the event that the Appellee is successful in recovering the amount sued for, and without regard to whether or not the Appellee's refusal to pay was reasonable or unreasonable, proper or vexatious, and without regard to whether the Appellant's refusal to pay was based upon a well founded belief, reasonably entertained, that the Appellee was not entitled to recover, and that said section of the Statutes aforesaid, as so construed, deprives the Appellant of due process of law and of the equal protection of the laws, contrary to the provisions of the Constitution of the United States as aforesaid, and of the Constitution of the State of Arkansas, as hereinabove set forth.

[fol. 41] SUPREME COURT OF THE UNITED STATES

[Title omitted.]

PETITION FOR APPEAL, STATEMENT, ASSIGNMENT OF ERRORS, JURISDICTION, AND PRAYER FOR REVERSAL

Petition for Appeal

Considering itself aggrieved by the decision of the Supreme Court of the State of Arkansas in the above styled

cause, the appellant herein, Life & Casualty Insurance Company of Tennessee, hereby prays that an appeal may be allowed to the Supreme Court of the United States herein, and have an order fixing the amount of the bond thereon.

Statement

This is a suit on an insurance policy for Five Hundred (500) Dollars, issued on the life of Jonas McCray, dated November 3, 1930. The policy lapsed on May 1, 1931 for non-payment of premium and was reinstated on August 1, 1931. Jonas McCray committed suicide on May 10, 1932, which was within one year from the date of the reinstatement or August 1, 1931. The judgment was for $790.45.

The policy provided:

"If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

The question presented was whether or not the one year set out in this suicide clause began to run from the date of the policy November 3, 1930, or from the date of the re-[fol. 42] instatement on August 1, 1931. Appellant, Life & Casualty Insurance Company of Tennessee, insisted that the legal effect of the lapse of the policy was to end entirely the relation between the parties and that when the policy was reinstated all of its provisions began to run from the date of the reinstatement on August 1, 1931. The Arkansas Courts held otherwise.

The appellant, Life & Casualty Insurance Company of Tennessee, is a Tennessee corporation and prior to the issuance of the policy the Supreme Court of Tennessee in the case of Insurance Company v. Galbraith, 115 Tenn. 477, held that where a policy lapsed for non-payment of premium and thereafter was reinstated the policy thereafter should be considered as of the date of the reinstatement, and that all of the terms of this policy began to run anew from such date. In thus deciding the question the Court said:

"It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at

maturity. Thompson v. Life Ins. Co., 104 U. S. 252, 86 L. Ed., 765; Ressler v. Life Insurance Company, 110 Tenn. 411, 75 S. W. 735.

"The effect of nonpayment of the premium is made clear by the policy itself. As is said in Lantz v. Insurance Co., 139 Pa. 546, 21 Atl. 81, 10 L. R. A. 577, 23 Am. St. Rep., 202: 'It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. * * * It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. * * * As to him (the assured) it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy.'

"This, it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question; and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy [fol. 43] has neither a legal nor an equitable claim on the company. By his failure to comply with the condition upon which it could be kept alive he has ipso facto forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued. If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract."

This being a Tennessee corporation, and this policy having been issued after that decision, the above decision became the interpretation placed upon the terms of the policy and became as much a part of the policy as if written ex-

pressly therein, and, therefore, the reinstatement of the policy on August 1, 1931, gave the policy a new date and the suicide of Jonas McCray having occurred within the period of one year from such time, the appellant was not liable on the policy. The Court in the case of State Life Insurance Company v. Spencer, published in the Advance Sheets of 62 F. (2) page 650, is to the same effect. By reading the opinion of the Supreme Court of Tennessee in the above case it will be seen that it was thoroughly considered and was supported by the authorities and the late decision above mentioned affirming the same proposition of law shows that appellant had the right to defend this suit in good faith. The Supreme Court of Arkansas had not in any reported case decided the question, but in the cases of New York Life Ins. Co. v. Adams, 151 Ark. 123, 235 S. W. 412; Security Life Ins. Co. v. Leeper, 171 Ark. 77, 284 S. W. 12; and Equitable Life Assurance Soc. v. King, 178 Ark. 293, 10 S. W. (2d) 891, held that an insurance company in reinstating the policy had no right to set out in the reinstatement contract any new conditions not set out in the policy. The present case did not involve that question as the reinstatement application did not set out any new condition. An entirely different question was presented.

Therefore, it is clear that the exact question in the pres- [fol. 44] ent case had never been determined by the Supreme Court of Arkansas. However, if it had, the present policy being issued by a Tennessee corporation, and the Tennessee Supreme Court having held prior to its issuance that the policy began to run anew from the date of its reinstatement, appellant had the right in good faith to ask the Supreme Court of Arkansas to consider the matter, and its act in doing so could not be considered an act of defending in bad faith.

The judgment in the present case was for the amount of the policy, Five Hundred (500) Dollars, and twelve (12) per cent or Sixty (60) Dollars penalty and attorney's fees of Two Hundred (200) Dollars, authorized under Crawford and Moses Digest of the Statutes of Arkansas, being also Section 1, Act 115, of 1905 of Arkansas, which is as follows:

"In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to

pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law collected."

The construction given by the Supreme Court of Arkansas is that this section imposes this penalty and attorney's fees in all cases where a judgment is rendered against an insurance company and the insurance company cannot defend against either the penalty or attorney's fees by proving or contending that their act in refusing to pay and in defending the law suit was good faith.

In disposing of this matter, after referring to the above cases holding that an insurance company in a reinstatement contract could not insert new conditions which as heretofore shown was not involved in this case, the Court held that the above penalty and attorney's fees were properly assessed, saying:

[fol. 45] "Assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, 47 S. W. (2d) 585, where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, 35 Fed. (2d) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

This appeal is now based upon the propositions that Section 6155 of Crawford & Moses' Digest of Arkansas is unconstitutional both under Article 1, Section 10 of the Federal Constitution forbidding a State to pass a law impairing the obligations of contracts and of the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, the Supreme Court of Arkansas having construed the above statute as being constitutional in all cases merely because a judgment is ren-

dered against an insurance company thereunder without reference to the refusal to pay and the defense of the law suit being made in bad faith.

Assignment of Errors

1

There is no evidence in the record to support the judgment of the Supreme Court of Arkansas in assessing the penalty of twelve (12) per cent and Two Hundred (200) Dollars attorney's fees under the above Arkansas Statute, appellant having acted in good faith in refusing to pay and in defending the case.

2

The Supreme Court of the State of Arkansas erred in holding that the above Statute of Arkansas was constitutional and could be applied to cases involving no bad faith in the refusal to pay or in the defense of the suit, and that it did not violate either Article 1 Section 10 of the Federal Constitution forbidding a State to pass laws impairing the obligations of contracts, or the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, both of said provisions of the Federal [fol. 46] Constitution forbidding a State to pass the law assessing penalties against insurance companies simply because such companies may not be successful in defending suits, and without reference to the lack of its good faith in refusal to pay and in defending such suits.

3

The Supreme Court of the State of Arkansas erred in assessing any judgment against appellant for the reason that appellant is a Tennessee Corporation and prior to the time the policy was issued the Supreme Court of Tennessee in the case of Insurance Company v. Galbraith, 115 Tenn. 477, had held that where a policy lapsed and was reinstated the date of the policy became the date of the reinstatement and all of its provisions began to run anew, and this policy being issued by a Tennessee Corporation the interpretation of the Supreme Court of Tennessee on the question became a part of the policy to the same extent

as if written therein, and the judgment of the Supreme Court of Arkansas holding to the contrary is a violation of Article 1, Section 10, of the Federal Constitution forbidding the impairment by a State of the obligations of contracts and of the Fourteenth Amendment of the Federal Constitution forbidding the taking of property without due process of law in that such judgment failed to give appellant the benefit of a contract which was plain and unambiguous.

Jurisdiction

The Acts of Congress, February 13, 1925, 43 Stat. 937; U. S. Comp. Stat. Sec. 1214 gives appellant the right of appeal direct to the Supreme Court of the United States from the judgment of the highest Court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State Court is in favor of its validity.

Such a question is presented here. Appellant contends that Sec. 6155 of Crawford and Moses' Digest of the Statutes of Arkansas heretofore copied is unconstitutional under Article 1, Section 10, of the Federal Constitution forbidding the passage of laws impairing the obligations of contracts and of the Fourteenth Amendment forbidding the taking of property without due process of law and [fol. 47] Arkansas Supreme Court has held the Statute valid against these objections. Therefore, appellant has the right to have this application for appeal granted. This question was considered by this Court in the case of Supreme Ruling of the Mystic Circle v. Snyder, 227 U. S. 497, 57 L. Ed. 611, in which it was urged that contrary to its terms, the Tennessee penalty statute authorized the assessment of the penalty where no bad faith was shown, the Court saying:

"The act does not make the mere refusal to pay sufficient evidence of bad faith, so as to justify the added recovery; it required that the bad faith be shown, and that the consequent additional loss be shown. And the state court so construed the statute in the application that was made in the present case."

The United States Court of Appeals for the Eighth Circuit has refused to follow the Alabama Supreme Court in holding this statute constitutional in the cases of Standard Accident Insurance Company V. Rossi, 35 F. (2d) 667 and Inter-Southern Life Insurance Company v. McElroy, 38 F. (2d) 557, and in the present case the Supreme Court of Arkansas expressly declined to follow the above decisions of the United States Circuit Court of Appeals for the Eighth Circuit, saying:

"* * * Assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. Security Ins. Co. v. Smith, 183 Ark. 254, 35 S. W. (2d) 581; Mut. Life Ins. Co. v. Marsh, 185 Ark. 332, 47 Circuit Court of Appeals in Standard Acc. Ins. Co. v. Rossi, S. W. (2d) 585, where we expressly refused to follow the 35 Fed. (2d) 667, and Inter-Southern Life Ins. Co. v. McElroy, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

Inasmuch as Arkansas is in the Eighth Circuit, this presents a conflict between these Courts as to the constitutionality of this Statute and your petitioner and other insurance companies have the right to have this matter settled by this Court.

The Supreme Court of Arkansas is the highest Court of Arkansas and the judgment in this case is final.

[fol. 48] Application for Appeal

Your petitioner applied to the Chief Justice of the Supreme Court of Arkansas for an order granting an appeal in this case, which was declined as shown by this record.

Prayer for Reversal

For which errors the appellant, Life & Casualty Insurance Company of Tennessee, prays that this appeal be granted and the said judgment (or decree) of the Supreme Court of the State of Arkansas, dated March 20, 1933, in the above entitled cause, be reversed as herein prayed and a judgment (or decree) rendered in favor of the said appellee, and for costs.

P. M. Estes, Attorney for Appellant.

[fol. 49] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER DENYING APPEAL

On this the 12th day of April, 1933, there is presented to me the undersigned, Chief Justice of the Supreme Court of Arkansas, the petition of the appellant, Life & Casualty Insurance Company of Tennessee, praying that an appeal be granted it from the deicsion of this Court of date March 20, 1933, to the Supreme Court of the United States.

After due consideration I am of the opinion that no Federal question is presented by said petition which would invoke the jurisdiction of the United States Supreme Court. Therefore, the petition and prayer for appeal is hereby denied.

Done at Little Rock, Arkansas, on this the 12th day of April, 1933.

C. E. Johnson, Chief Justice Arkansas Supreme Court.

[fol. 50] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment (or decree) made and entered in the above entitled cause by the Supreme Court of the State of Arkansas on the 20th day of March, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the Rules of the Supreme Court of the United States in such case made and provided,

It is now ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Arkansas in the above entitled cause, as provided by law, and it is further ordered that the clerk of the Supreme Court of the State

of Arkansas shall prepare and certify a transcript of the record, proceedings and judgment (or decree) in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within 40 days of this date.

And it is further ordered that security for the judgment and costs on appeal be fixed in the sum of $1,600.00.

Dated this 21st day of April, 1933.

Pierce Butler, Associate Justice of the Supreme Court of the United States.

[fols. 51 & 52] Bond on appeal for $1,600.00 approved; omitted in printing.

[fols. 53-70] Citation in usual form showing service on Hill, Fitzhugh, Brizzolara, filed April 28, 1933, omitted in printing.

[fol. 71] Certificate of lodgment omitted in printing.

[fol. 72] Return to allowance of appeal omitted in printing.

[fol. 73] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed May 22, 1933

Comes now the appellant in the above entitled cause and states that the points upon which he intends to rely in this Court in this case are as follows:

Point 1. There is no evidence in the record to support the judgment of the Supreme Court of Arkansas in assessing

the penalty of twelve (12) per cent and Two Hundred (200) Dollars attorney's fees under the above Arkansas Statute, appellant having acted in good faith in refusing to pay and in defending the case.

Point 2. The Supreme Court of the State of Arkansas erred in holding that the above Statute of Arkansas was constitutional and could be applied to cases involving no bad faith in the refusal to pay or in the defense of the suit, and that it did not violate either Article 1, Section 10 of the Federal Constitution forbidding a State to pass laws impairing the obligations of contracts, or the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, both of said provisions of the Federal Constitution forbidding a State to pass a law assessing penalties against insurance companies simply because such companies may not be successful in defending suits, and without reference to the lack of its good faith in refusal to pay and in defending such suits.

Point 3. The Supreme Court of the State of Arkansas erred in assessing any judgment against appellant for the [fol. 75] reason that appellant is a Tennessee Corporation and prior to the time the policy was issued the Supreme Court of Tennessee in the case of Insurance Company v. Galbraith, 115 Tenn. 466, had held that, where a policy lapsed and was reinstated, the date of the reinstatement became the date of the policy and all of its provisions began to run anew, and the suicide of the assured being within one year from the date of the reinstatement, there could be no recovery; and this policy, being issued by a Tennessee Corporation, the interpretation of the Supreme Court of Tennessee on the question became a part of the policy to the same extent as if written therein, and the judgment of the Supreme Court of Arkansas holding to the contrary is a violation of Article 1, Section 10, of the Federal Constitution forbidding the impairment by a State of the obligations of contracts and of the Fourteenth Amendment of the Federal Constitution forbidding the taking of property without due process of law in that such judgment failed to give appellant the benefit of a contract which was plain and unambiguous.

Point 4. The judgment of the Supreme Court of Arkansas in this case violates the Constitution of the United States in the following particulars:

1. Article 4, Section 1:

"Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Section 6132 of the Code of Tennessee for 1932 expressly provides that appellant shall not discriminate between policy holders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennesssee, both by the above Section of Tennessee Code and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, and in violation of both statutes to make the same identical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but [fol. 76] it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas statute, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the decision in Galbraith v. Ins. Co., 115 Tenn. 477, holding that under the language of this particular policy, it began to run anew from the date of the reinstatement, constitutes a judicial proceeding, which became a part of the contract itself, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, now give "full faith and credit" to either.

2. The interpretation of the Tennessee Supreme Court in Galbraith v. Insurance Company, supra, became a part of this policy and this later decision and judgment of the

Arkansas Supreme Court giving the contract an entirely different meaning constitutes a "subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void", as was held in Edwards v. Kearzey, 96 U. S., 595, 607 (24: 793, 798).

Section 10, Subsection 1, of the Federal Constitution provides:

"No State" shall make a law impairing the obligation of contracts, and the Fourteenth Amendment expressly prohibits "any State" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

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Answer	4
Agreed Statement of Facts	17
Judgment of Lower Court	7
Motion for New Trial	9
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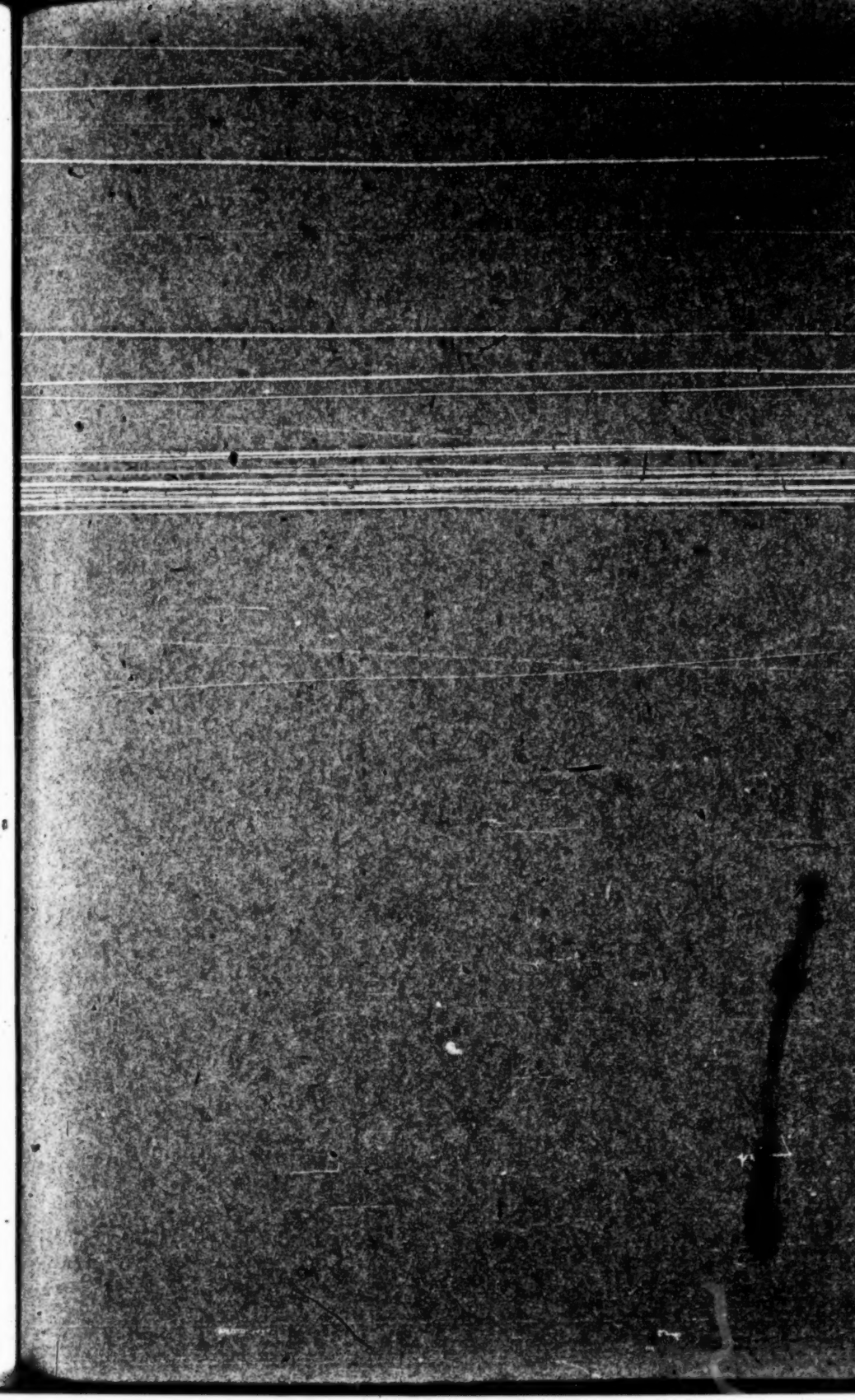
P. M. Estes, Counsel for Appellant, Life & Casualty Insurance Company of Tennessee.

We acknowledge service of the above "Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed", together with copy thereof for our use, this 17 day of May, 1933.

Hill, Fitzhugh & Brizzolara.

[fol. 78] [File endorsement omitted.]

Endorsed on cover: File No. 37,691. Arkansas Supreme Court. Term No. 89. Life & Casualty Insurance Company of Tennessee, appellant, vs. Ossie McCray. Filed May 22, 1933. No. 89, O. T., 1933.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 994

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY.

STATEMENT OF JURISDICTION AS REQUIRED BY PARAGRAPH 1 OF RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

Jurisdiction.

The Acts of Congress, February 13, 1925, 43 Stat. 937; U. S. Comp. Stat. Sec. 1214 gives appellant the right of appeal direct to the Supreme Court of the United States from the judgment of the highest court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

The Supreme Court of Arkansas is the highest court in that State and the judgment sought to be appealed from is final.

Date of Decree.

The date of the final judgment in the Supreme Court of Arkansas is March 20, 1933, and the application for appeal was presented on April 12, 1933.

Statement.

This is a suit on an insurance policy for Five Hundred (500) Dollars, and the judgment in the Supreme Court of Arkansas was for Seven Hundred Ninety and 45/100 (790.45) Dollars, which included an item of Sixty (60) Dollars, being 12% of the amount of the policy, and Two Hundred (200) Dollars attorney's fees assessed by the lower court and affirmed by the Supreme Court under Section 6155 of Crawford and Moses' Digest of Arkansas copied in full on page 4 of the petition for appeal heretofore filed, the other items being for interest and court costs.

The policy was upon the life of one Jonas McCray, who committed suicide on May 10, 1932.

The policy contained the following provision:

> "If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon."

The policy was dated November 3, 1930, and lapsed for non-payment of premium on May 1, 1931, and was reinstated on August 1, 1931, the said death being

within one year from the date of reinstatement.

The question presented on its merits in the court below was whether the one year suicide clause began to run from the date of the policy, November 3, 1930, or from the date of the reinstatement, or August 1, 1931.

The petitioner, Life & Casualty Insurance Company of Tennessee, is a Tennessee corporation, and at its September Term, 1905, the Supreme Court of Tennessee in the case of *Insurance Company* v. *Galbraith*, 115 Tenn. 471, held that where a policy lapsed and was reinstated it became a new contract, and its date thereafter should be considered as the date of the reinstatement and that all of the terms and provisions of the policy began to run anew from the date of the reinstatement. This case is referred to and copied from at some length on pages 2 and 3 of the petition for appeal to which reference is here made.

The petitioner being a Tennessee corporation, and this policy being issued after the above decision, this interpretation of the words in the policy became a part of the policy to the same extent as if actually written therein and, therefore, the suicide having occurred within one year from the date of the reinstatement, the said policy imposed no liability upon your petitioner. Accordingly, your petitioner denied liability and this suit resulted.

It is clear that after the decision of the Galbraith case above, no Tennessee policy holder would be entitled to be paid anything under a policy where it had lapsed and been reinstated and suicide had occurred

within one year from the date of the reinstatement, and if your petitioner had permitted an Arkansas policy holder to recover, under these circumstances, it would have amounted to giving the Arkansas policy holder greater benefits under the policy than were enjoyed by the Tennessee policy holders. Your petitioner was expressly forbidden to do this by Section 6132 of the Tennessee Code of 1932, providing:

> "No life insurance company doing business in Tennessee shall make or permit any distinction or discrimination between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates to be charged for policies of life or endowment insurance or in the dividends or other benefits paid thereon or in any other of the terms and conditions of the contracts it makes; * * *"

The Supreme Court of Arkansas prior to the time that this suit had been instituted, in the cases of *New York Life Insurance Company* v. *Adams*, 155 Ark. 123; *Security Life Insurance Company* v. *Leeper*, 171 Ark. 77, and *Equitable Life* v. *King*, 178 Ark. 293, had held that an insurance company in reinstating a policy could not insert any new provisions not contained in the policy itself. None of these cases discussed or decided the proposition here involved, that is, whether under the original policy where the Supreme Court of the State under which the Company was organized had given a definite construction to the words used therein, the lapse and reinstatement of the policy constituted a new contract and a new date from which all of the provisions of the policy began to run anew. The

Supreme Court of Arkansas differed with the Supreme Court of Tennessee and held that where a policy was reinstated, its provisions ran from the original date of the policy and not from the date of the reinstatement, and, accordingly, that the death of McCray within one year from the date of the reinstatement but more than one year from the date of the policy constituted no defense.

We are not now presenting the question as to whether the Supreme Court of Tennessee was right or whether the Supreme Court of Arkansas was wrong, but merely to show that this suit presented a *bona fide* substantial controversy and that your petitioner had the right to refuse to pay this policy and to defend it in good faith.

In rendering judgment against your petitioner and in construing this policy directly opposite from the Supreme Court of Tennessee, the Supreme Court of Arkansas assessed a penalty of 12 per cent of the amount of the policy, to-wit, sixty (60) dollars, and two hundred (200) dollars attorney's fees under Section 6155 of Crawford & Moses' Digest of Arkansas, which is as follows:

> "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss; said attorney's fees

> to be taxed by the Court where the same is heard on original action, by appeal or otherwise, and to be taxed up as a part of the costs therein and collected as other costs are, or may be by law, collected."

The construction placed by the Supreme Court of Arkansas upon this statute was that it imposed these penalties upon your petitioner without reference to whether or not it acted in good faith in refusing to pay and in defending the suit. Your petitioner contended before the Supreme Court of Arkansas and now contends that this statute thus construed violates the Constitution of the United States in two particulars: (1) it violates Article 1, Section 10, forbidding the passage of any law "impairing the obligations of contracts"; and (2) the Fourteenth Amendment forbidding any State to "deprive any person of life, liberty or property, without due process of law".

As applied to Article 1, Section 10, your petitioner contends that requiring it to pay the sum of two hundred sixty (260) dollars in addition to the amount of five hundred (500) dollars imposed by the contract, is impairing the obligation of the contract, and that placing a penalty upon your petitioner merely because a judgment might be rendered against them is denying your petitioner of the right to resort to courts in a defense of a claim to which it believes it has an honest defense. The very essence of the Fourteenth Amendment is the right in good faith to take any controversy to courts because it is only in courts and by courts that due process may be had.

This entire matter was discussed by this Court in the case of *Supreme Ruling of the Mystic Circle* v. *Snyder*, 227 U. S. 497, 57 L. Ed. 611, where the court considered the constitutionality of the Tennessee penalty statute and in which the court said:

> "The act does not make the mere refusal to pay sufficient evidence of bad faith, so as to justify the added recovery; it requires that the bad faith be shown, and that the consequent additional loss be shown. And the State Court so construed the statute in the application that was made of it in the present case."

It thus appears that this case involves the constitutionality of said Section 6155 of Crawford & Moses' Digest of Arkansas in that petitioner contends that the section violates the constitution of the United States in two particulars: (1) Article 1, Section 10, forbidding the impairment of contracts; and (2) the Fourteenth Amendment forbidding the taking of property without due process of law; and that the Supreme Court of Arkansas held the statute valid against these contentions. Therefore, this application for appeal comes directly within the Act of Congress, February 13, 1925, 43 Stat. 937, U. S. Comp. Stat. Sec. 1214, giving the petitioner the right of direct appeal to the Supreme Court of the United States from the judgment of the highest court of the State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State court is in favor of its validity.

We further wish to emphasize as worthy of special consideration the fact that Arkansas is situated in the eighth circuit and that the decisions of that court and the United States Circuit Court of Appeals is in direct conflict as shown by the following language taken from the opinion of the Supreme Court of Arkansas in the present case:

> "• • • assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. *Security Ins. Co.* v. *Smith*, 183 Ark. 254, 35 S. W. (2d) 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, *where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d) 667, and *Inter-Southern Life Ins. Co.* v. *McElroy*, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

This quotation shows that the Supreme Court of Arkansas construes the decisions of the United States Circuit Court of Appeals for the Eighth Circuit as holding the statute in controversy here unconstitutional in the above cases, and this presents a direct conflict between these high Courts within the same territorial jurisdiction.

This shows that the subject-matter of this appeal is not frivolous but one of material and substantial merit, presenting the constitutionality of the above statute as above set forth. It further shows that in view of this direct conflict existing on this question between the Supreme Court of Arkansas and the United States Court of Appeals for the Eighth Cir-

cuit, your petitioner and other insurance companies are entitled to have this Court settle the matter.

Authorities Sustaining Jurisdiction.

Acts of Congress, February 13, 1925; 43 Stat. 937; U. S. Comp. Stat. Sec. 1214, giving the right of appeal direct to the Supreme Court of the United States from the judgment of the highest Court of a State where the constitutionality of a State statute is drawn in question as being repugnant to the Constitution of the United States and the decision of the State Court is in favor of its validity.

Supreme Ruling of *Mystic Circle* v. *Snyder*, 227 U. S. 497, holding the Tennessee insurance penalty statute constitutional on the ground that it did not merely give the penalty for an unsuccessful defense, but where the defense was made in bad faith.

Standard Life Ins. Co. v. *Rossi*, 35 F. (2) 667, and *Inter-Southern Life Insurance Company* v. *McElroy*, 38 F. (2) 557, holding Section 6155 of Crawford & Moses' Digest of Arkansas unconstitutional if applied to cases not showing bad faith.

Fourteenth Amendment of the Federal Constitution, forbidding the taking of property without due process of law, which means that every litigant has the constitutional right to litigate any question so long as he acts in good faith.

Galbraith v. *Insurance Company*, 115 Tenn. 471, holding that where a policy lapses and is reinstated, the date of the policy is then considered as of the date of the reinstatement and all of its provisions

begin to run anew. See also *Ins. Co.* v. *Spencer*, 62 F. (2) 650.

This statement relating to jurisdiction is prepared under a telegram from Hon. Charles Elmore Cropley, Clerk of this Court, advising that the Court wishes a statement of jurisdiction furnished as required by paragraph 1 of Rule 12 of this Court.

Respectfully submitted,

P. M. Estes,
Attorney for Life & Casualty Insurance Company of Tennessee.

FILED
MAY 22 193
CHARLES ELMORE C

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1932

No. [redacted] 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

Appellant and Petitioner

vs.

OSSIE McCRAY

Appellee and Respondent

BRIEF OPPOSING APPELLEE'S AND RESPONDENT'S MOTION TO DISMISS THE APPEAL PRAYED FOR IN THIS CASE

P. M. ESTES,
Attorney for Appellant.

MOREAU P. ESTES,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1932

No.————

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

Appellant and Petitioner

vs.

OSSIE McCRAY

Appellee and Respondent

BRIEF OPPOSING APPELLEE'S AND RESPONDENT'S MOTION TO DISMISS THE APPEAL PRAYED FOR IN THIS CASE

POINT 1

Appellee contends that this appeal ought to be dismissed; for the reason that this Court in the cases of *Fidelity Mutual Life* v. *Mettler*, 185 U. S., 308; *Iowa Life* v. *Lewis*, 187 U. S., 335; *Home Life* v. *Fisher*, 188 U. S., 626, and *Farmers and Merchants Insurance Company* v. *Dobney*, 189 U. S., 301, has settled all doubt as to the constitutionality of Section 6155 of Crawford & Moses' Digest of Arkansas, imposing a penalty upon insurance companies for failure to pay claims.

The above cases were decided upon two questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and,

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of *Security Mutual Life* v. *Pruitt*, 202 U. S., 264, 50 L. Ed., 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that it would not remove a case from the State to the Federal Court, but in *Terral* v. *Burke Construction Company*, 257 U. S., 529, 66 L. Ed., 352, this Court reversed that ruling, and held that the right of corporations to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In *Mortensen* v. *Security Insurance Company*, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition that an insurance company should not remove a case from a State to a Federal Court.

We, therefore, submit that the above cases relied upon by appellee are no longer applicable so far as relates to the right of an insurance company to resort to any Court in order to defend a suit in good faith.

Likewise the case of *Zioux County* v. *National Surety Co.*, 276 U. S., 239, 72 L. Ed., 549, cited by appellee, has no bearing

upon the contention here made. That case related to the right of the attorneys for the county to have taxed as cost an attorneys' fee, as authorized by Section 6193 of the Nebr. Comp. Stat. The United States Circuit Court of Appeals for the Eighth Circuit held that, inasmuch as Rev. Stat., Sec. 823 and 824 provided what costs should be taxed against litigants in the Federal Court, a State statute in reference to costs would have no application. This Court reversed the Court of appeals on this point. However, the following shows that we have correctly stated the point upon which the Court decided the case:

> "In striking down so much of the judgment as allowed an attorney's fee the Court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the State Court. As costs in the Federal Courts are regulated *exclusively* by Rev. Stat., Sec. 823 and 824, the Court concluded that *other costs* authorized *only by a State statute*, could not be included in the judgment."

It will thus be seen that this Court in none of the cases mentioned above, relied upon by appellee, considered or decided the point that a State statute could not authorize the assessment of penalties or attorney's fees against an insurance company merely because a judgment might be rendered against it, and without reference to its *bad faith* in denying payment of the claim and resisting suit in Court.

However, this Court did have before it in the case of Supreme Ruling of the *Mystic Circle* v. *Snyder*, 227 U. S., 500, 57 L. Ed., 614, the exact question presented in this case. The Tennessee statute provided a penalty against insurance companies where the failure to pay was in bad faith, and, not-

withstanding this provision, it was contended that the effect of the Tennessee statute was to penalize insurance companies merely because a judgment might be rendered against them. To show that this Court understood the contention as we have thus stated it, we quote the following:

> "But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the *absence of bad faith*. That is, we are to take the statute as including what it expressly excludes—as allowing what it explicitly denies. The act does not make the *mere refusal* to pay sufficient evidence of bad faith, so as to justify the added recovery; it requires that the *bad faith be shown*, and that the *consequent additional loss be shown*. And the State Court so construed the statute in the application that was made of it in the present case."

In order to show that the Court in the above case considered the very point presented in this case, we quote the following:

> "The statute is aimed, not at the rights secured by the contract, but at *dishonest methods* employed to defeat them. The additional liability is attached to *bad faith alone*. This is the necessary effect of the proviso. It is only when it is 'made to appear to the Court or jury trying the case that the refusal to pay said loss was *not in good faith*' that the added recovery may be had. It must also appear that such refusal *inflicted* '*additional expense, loss, or injury*' upon the policyholder, and it is this *further expense, loss, or injury* that *measures* the amount to be allowed, which is not to exceed 25 per cent of the liability on the policy.
>
> "It cannot be said that this effort to give indemnity

for the *injuries* which would be *sustained* through *perverse methods* and through an *abuse* of the *privileges accorded to honest litigants* imposed a burden upon the enforcement of the contract. Neither the contract nor the existing law which entered into it contemplated contests *promoted in bad faith*, or justified the *infliction of loss* by such means. The State was entitled at all times to take proper measures to prevent the *perversion* of its *legal machinery*, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be *availed of bona fide*."

We submit that it is certain that the cases of *Terral* v. *Burke Construction Company*, *supra*, and *Mortensen* v. *Security Insurance Company*, *supra*, have definitely decided that a State may not, under the Fourteenth Amendment, deny a litigant, as a condition precedent to admission into the State, the right to resort to *Federal Courts*. We also submit that the case of Supreme Ruling of the *Mystic Circle* v. *Snyder*, *supra*, extends this rule to State Courts, where the refusal to pay the claim or the defense was not in *bad faith*. But if we are mistaken as to the extension of this rule to State Courts by the last named case, it cannot be disputed that the point is now being presented for the first time for the consideration of this Court.

When we consider that it is only by executions and other processes of Courts that property may be taken, it ought to be clear that the right to resort to Courts *honestly and in good faith* is the *very essence* of the Fourteenth Amendment. By a long line of judicial decisions, the maxim of law has been thoroughly established that the right to *tax or the right to regulate is* the *right to destroy*, and, accordingly, if a State

Legislature may impose a penalty merely because a judgment is rendered against an insurance company, it could go further and *deny* such company the *right* to *resort to Courts at all either in the assertion or defense of its rights.* If this could be done, the Fourteenth Amendment would be a useless scrap of paper.

The appellee cited only the cases of *Fidelity Mutual Life* v. *Mettler, supra; Iowa Life* v. *Lewis, supra; Home Life* v. *Fisher, supra; Farmers and Merchants Ins. Co.* v. *Dobney, supra;* and *People of Zioux County* v. *National Surety Co. supra,* as being cases by this Court settling the proposition that a State may constitutionally impose a penalty upon an insurance company merely because a judgment might be rendered against it without reference to *bad faith* in refusing to pay the claim and in defense of the suit. We have heretofore discussed each of these cases, and shown that the point here presented, that is, the *good or bad faith* of the refusal to pay or defend, was not involved in any of them.

On the other hand, we expressly point out that, in the cases of *Standard Life* v. *Rossi,* 35 F. (2), 679, and *Intersouthern Life Ins. Co.* v. *McElroy,* 38 F. (2), 557, the United States Circuit Court of Appeals for the Eighth Circuit has held Sec. 6155 of Moses and Crawford's Digest unconstitutional, if construed to impose penalties merely because a judgment is given, and *without reference to the element of bad faith.*

This conflict between these Courts, covering the same territory, is recognized by the Supreme Court of Arkansas in the present case in its opinion as follows:

> " . . . but assuming appellant defended in *good faith,* this does not excuse it from the plain provisions of the

statute. *Security Ins. Co.* v. *Smith*, 183 Ark., 254, 35 S. W. (2d), 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark., 332, 47 S. W. (2d),585, *where we expressly refused to follow the Circuit Court of Appeals* in *Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d), 667, and *Inter-Southern Life Ins. Co.* v. *McElroy*, 38 Fed. (2d), 557. This question is now settled and we decline to reconsider the matter."

This conflict between these two Courts, covering the same territory, is one that ought to be settled by this Court, and in itself presents sufficient reason why this appeal ought to be sustained and the motion to dismiss ought to be disallowed.

POINT 2

The point involved in this case on its merits is from *what date* do the provisions of a policy commence to run where it has *lapsed and been reinstated?* Does it begin to run from the date of the policy itself, or from the date of the *reinstatement?*

Appellant is a Tennessee corporation, and, prior to the issuance of this policy, the Supreme Court of Tennessee, in the case of *Insurance Company* v. *Galbraith*, 115 Tenn., 477, held that, under these circumstances, the policy began to run anew from the date of the reinstatement as shown by the following quotation:

"It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at maturity. *Thompson* v. *Life Ins. Co.*, 104 U. S., 252, 86 L. Ed., 765; *Ressler* v. *Life Insurance Company*, 110 Tenn., 411, 75 S. W., 735.

"The effect of nonpayment of the premium is made

clear by the policy itself. As is said in *Lantz* v. *Insurance Co.*, 139 Pa., 546, 21 Atl., 81, 10 L. R. A., 577, 23 Am. St. Rep., 202: 'It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. . . . It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It does not require a formal forfeiture. . . . As to him (the assured) it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy.'

"This it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question; and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the conditions upon which it could be kept alive he has *ipso facto* forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued. If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract. And it would seem also to be as certainly true that if the assured obtained the reinstatement by fraud, or by false

warranties material to the risk, during the period reserved for contest, the company should be allowed to protect itself against such unfair dealing.

"In *Bottomley* v. *Insurance Company*, 170 Mass., 274, 49 N. E., 438, it is said that a revived policy of life insurance does not go into effect if a declaration or warranty contained in the application therefor is untrue. This statement, however, must be taken with the modification that if the policy contains a time limit, beyond which it is incontestable, when that limit is passed, then, unless fraud is within the class excepted from the operation of the clause fixing the limit, it is no longer a defense, but the policy is then affected notwithstanding the fraud."

The law is well settled that, where the language of an insurance policy has been construed by the Supreme Court of the Home State of the corporation, the *interpretation* placed by that Court upon such language becomes as much a *part of the policy* as if it were expressly *set out therein*, as held by the following cases:

Armour Packing Co. v. *U. S.*, 82, C. C. A., 135, 153 F. 1, Eighth Circuit, 14 L. R. A. (N. S.), 415:

"But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and *material* part of the contract. That rule is that *all laws* in existence when an *agreement is made* necessarily *enter into and form* a part of it as fully as if they were *expressly referred to or incorporated into its terms. Von Hoffman* v. *Quincy* (*United States ex rel. Von Hoffman* v. *Quincy*), 4 Wall., 535, 550, 18 L. Ed., 403, 408; *Rees* v. *Watertown*, 19 Wall., 107, 121, 22 L. Ed., 72, 76; *Edwards* v. *Kearzey*,

96 U. S., 595, 601, 24 L. Ed., 793, 796; *Seibert* v. *Lewis* (*Seibert* v. *United States*), 122 U. S., 284, 295, 30 L. Ed., 1161, 1165, 7 Sup. Ct. Rep., 1190; *Southern R. Co.* v. *Bouknight*, 30 L. R. A., 823, 17 C. C. A., 181, 185, 25 U. S., App., 415, 70 Fed., 442, 446."

Seibert v. *U. S.*, 122 U. S., 284, 30 L. Ed., 1165:

"It is well settled by the decisions of this Court that 'The remedy subsisting in a State, when and where the contract is made and is to be performed, is a *part of its obligation*, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void.' *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24: 793, 798)."

Section 6132 of the Tennessee Code of 1932 provides:

"*No Discriminations in Favor of Insurants Allowed; Contract to Be Expressed in Policy.*—No life insurance company doing business in Tennessee shall make or permit any *distinction* or *discrimination* between *insurants of the same class* and equal expectation of life in the amount or payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in *any other of the terms and conditions of the contracts* it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as an inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance."

Therefore, as to Tennessee policyholders, there could be no recovery under the facts of the present case; for the reason that the suicide occurred within one year from the date of the reinstatement, and, if the Company had paid this claim to a citizen of Arkansas on the theory that the suicide clause began to run from the date of the policy, and not from the date of the reinstatement, a discrimination against Tennessee policyholders would result, and appellant would clearly be in violation of the above Tennessee statute and be liable to fine and to have its charter revoked.

Section 322 of the Digest of Insurance Laws of Arkansas, being Sec. 10 of the Act 493 of 1921, is as follows:

> "It shall be unlawful for any life insurance company doing business in this State to *permit distinction or discrimination* between *individuals of the same class or of equal expectation of life* in the amount of payment of *premiums, rates, dividends, benefits, terms* or *conditions* of contracts of life or endowment insurance; nor shall any life insurance company, or agent thereof, make any contract except as is plainly expressed in the policy of insurance; nor shall any life insurance company, officer or agent thereof, pay, offer to pay, directly or indirectly, as an inducement to insurance, any rebate of premiums on the policy of insurance, or any other thing of value whatsoever not specified in the policy contract. Any company or agent violating the provisions of this Section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and the Commissioner shall cancel the right of the company, or agents convicted, to transact business in this State for a period of one year. Provided, the company shall not be held liable under this Section for any act of its agents

unless such act was authorized by one of its officers, State managers, State or general agents.—Sec. 10, Act 493, of 1921."

It will be noted that the Tennessee and Arkansas statutes above quoted are in almost identical language, both expressly prohibiting under extreme penalties, appellant from *discriminating between policyholders*. It will be also noted that the prohibition under the Arkansas statute does not limit this discrimination to *Arkansas policyholders*, but to policyholders in general. Accordingly had appellant paid the present claim, it, as aforesaid, would have been a discrimination against Tennessee policyholders, and it would have violated both the Tennessee and Arkansas statutes.

In other words, the same identical contract with the same identical words would mean one thing in Tennessee and another in Arkansas, which necessarily means that the Arkansas policyholder would be paid a claim denied to the Tennessee policyholder, thus presenting a clear case of discrimination.

By paying this claim, thus discriminating against Tennessee policyholders and violating both of the said anti-discrimination statutes of Arkansas and Tennessee, appellant would have created a situation where it would have violated the above Tennessee statute, and would under the Arkansas statute have subjected itself to a fine of $100.00 to $500.00, and where it would be mandatory upon the Commissioner of Insurance of Arkansas to cancel appellant's rights to do business in that State.

The case of *New York Life Ins. Co.* v. *Adams*, 151 Ark., 123; *Security Life* v. *Leeper*, 171 Ark., 77, and *Equitable Life*

v. *King*, 178 Ark., 293, relied upon by appellee as deciding the above identical question, do not apply in the remotest degree.

The question in those cases was whether or not after a policy had lapsed, the company could impose any *new* conditions as a condition precedent to reinstatement. The points here involved were not discussed at all, that is, the meaning of the terms of the *original* policy construed in the light of *Tennessee decisions*, and especially in reference to the said anti-discrimination statutes of Tennessee and Arkansas. Accordingly, it is clear that the point involved in this suit had not prior to the present case been decided by the Supreme Court of Arkansas.

Therefore, we submit that the decision and judgment of the Supreme Court of Arkansas violates the Federal Constitution in the following particulars:

1. Art. 4, Sec. 1:

> "Section 1. Full faith and credit shall be given in each State to the *public acts*, records, and *judicial proceedings* of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The Public Acts of Tennessee, Sec. 6132, expressly provides that appellant shall not discriminate between policyholders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this Company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennessee, both by the Tennessee and Arkansas anti-discrimination statutes, and in violation of both statutes to make the same iden-

tical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas statute, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the decision in *Galbraith* v. *Ins. Co.*, 115 Tenn., 477, holding that under the language of this particular policy, it began to run anew from the *date of the reinstatement*, constitutes a judicial proceeding, which *became a part of the contract itself*, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, nor give "full faith and credit" to either.

2. As heretofore shown, the interpretation of the Tennessee Supreme Court in the Galbraith case became a part of this policy and the later decision and judgment of the Arkansas Supreme Court giving the contract an entirely different meaning, constitutes a "*subsequent law* of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void," as was held in *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24: 793, 798).

Section 10, Subsection 1 of the Federal Constitution provides: "No *State*" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any *State*" from taking property without due process of

law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

Taylor on Due Process of Law, page 264, says:

> "But while it is thus settled that erroneous decisions of a State Court do not deny due process so long as they are limited to questions involving conformity with the Constitution and laws of the State, the fact remains that such *decisions must not deprive a person of those fundamental rights which the Federal Constitution guarantees.* Such rights must not be abridged either by the law which the Court is administering or by the *conduct of the Court itself* while acting under it."

This Court in *Woodson* v. *Railroad*, 134 U. S., 614, expressly held that the judgment of the Tennessee Supreme Court was void under the Fourteenth Amendment in holding that a judgment was valid where not supported by any evidence.

The Arkansas Supreme Court in this case in the following words recognized the right of appellant to so word its policy as to make it run anew from the date of the reinstatement:

> "Time is to be reckoned 'from the date of issue of this policy,' not from the date of reinstatement, nor from the date of any other policy. *No doubt appellant could have so worded its policy*, but it has not seen fit to do so."

We point out again that this policy was in fact *so worded;* for the reason that the identical words used in the policy had

theretofore by the Supreme Court of Tennessee in the Galbraith case been held to mean that the policy began to run anew from the date of the *reinstatement*, and this policy, having been issued after said decision, the interpretation placed upon these words by the Supreme Court of Tennessee became as much a part of the contract as if actually expressed therein, and consequently the policy was "*so worded*," and the Arkansas Supreme Court erred in failing and refusing to give it *this interpretation*.

We are not in any way attempting to deny the stipulation that the policy in suit was an Arkansas contract. However, we do point out that this stipulation is meaningless, inasmuch as the said Arkansas anti-discrimination statute expressly forbids this Company to pay an Arkansas policyholder a claim which could not be paid to a Tennessee policyholder, and accordingly the laws of Tennessee and Arkansas are identical on this point.

We, therefore, submit that appellant is entitled to have its appeal sustained, inasmuch as it presents the constitutionality of Section 6155 of Crawford & Moses' Digest of the statutes of Arkansas on points not heretofore adversely passed upon by this Court, and that the motion of appellee to dismiss the appeal should be disallowed.

All italics are ours.

Respectfully submitted,

P. M. ESTES,
Attorney for Appellant.

MOREAU P. ESTES,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

OSSIE McCRAY, Appellee

BRIEF OF APPELLANT, LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

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Life & Casualty Insurance Company of Tennessee.

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IN THE

Supreme Court of the United States

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

OSSIE McCRAY, Appellee

BRIEF OF APPELLANT, LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

I.

THE OPINION OF THE COURT BELOW

The opinion in the Arkansas Supreme Court has not been officially reported, but is copied in full in the record pages 16-19 inclusive.

II.

JURISDICTION

The statement of jurisdiction as required by paragraph 1 of Rule 12 of the Supreme Court of the United States, has heretofore been filed and printed, and reference is here made to it as fully as if it were herein copied in full.

III.

STATEMENT OF CASE

This is a suit on an insurance policy for Five Hundred (500) Dollars, and the judgment in the Supreme Court of Arkansas was for Seven Hundred Ninety and 45/100

(790.45) Dollars, which included an item of Sixty (60) Dollars, being 12% of the amount of the policy, and Two Hundred (200) Dollars attorney's fees assessed by the lower court and affirmed by the Supreme Court under Section 6155 of Crawford and Moses' Digest of Arkansas hereinafter copied in full, the other items being for interest and court costs.

The policy was upon the life of one Jonas McCray, who committed suicide on May 10, 1932, (Record, page 12) and appears in full on pages 4a, 4b, 4c, and 4d of the transcript.

The policy was dated November 3, 1930, and lapsed for non-payment of premium on May 1, 1931, (Record, page 11) and was reinstated on July 15, 1931, (Record, page 12) the said death being within one year from the date of reinstatement.

The following provision of the policy presents the matter in controversy:

> "If within one year from the date of issue of this policy, the insured shall, whether sane or insane, die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon." (Record, page 12).

The contention of appellee as made in the Declaration was that the reinstatement of the policy continued it in force as an existing policy and that the above clause related back to the date of the policy itself, and that the death of the assured being more than one year from the date of the policy, to-wit: November 3, 1930, the suicide under the terms of the policy did not void it. The contention made by the appellant in its answer and pleadings was that when the policy lapsed on July 15, 1931, it was a complete termination of the relationship of the Company and the assured

and beneficiary; that upon its reinstatement on July 15, 1931, it became a new contract, as if then first written, and the above suicide clause began to run anew, and that the death of the assured within one year from the date of the reinstatement voided the policy. The question, therefore, upon which the liability of the appellant depended, was whether or not the suicide clause began to run from the date of the reinstatement on July 15, 1931, or whether it began to run from the date of the policy, November 3, 1930. Inasmuch as it is stipulated that the assured committed suicide on the 10th day of May, 1932, if the suicide clause began to run from the date of the policy, November 3, 1930, the appellant was liable, but if it began to run from the date of the reinstatement on July 15, 1931, the appellant was not liable.

The Circuit Court held appellant liable, and this judgment was affirmed by the Arkansas Supreme Court. Appeal to this Court was prayed and was refused by the Arkansas Chief Justice, but was granted by Mr. Justice Butler of the Supreme Court of the United States.

IV.

SPECIFICATIONS OF ERRORS

1. There is no evidence in the record to support the judgment of the Supreme Court of Arkansas in assessing the penalty of twelve (12) per cent and Two Hundred (200) Dollars attorney's fees under the above Arkansas Statute, appellant having acted in good faith in refusing to pay and in defending the case.

2. The Supreme Court of the State of Arkansas erred in holding that the above Statute of Arkansas was constitu-

tional and could be applied to cases involving no bad faith in the refusal to pay or in the defense of the suit, and that it did not violate either Article 1, Section 10, of the Federal Constitution forbidding a State to pass laws impairing the obligations of contracts, or the Fourteenth Amendment of that Constitution forbidding the taking of property without due process of law, both of said provisions of the Federal Constitution forbidding a State to pass a law assessing penalties against insurance companies simply because such companies may not be successful in defending suits, and without reference to the lack of its good faith in refusal to pay and in defending such suits.

3. The Supreme Court of the State of Arkansas erred in assessing any judgment against appellant for the reason that appellant is a Tennessee Corporation, and prior to the time the policy was issued the Supreme Court of Tennessee in the case of *Insurance Company* v. *Galbraith*, 115 Tenn. 466, had held that, where a policy lapsed and was reinstated, the date of the reinstatement became the date of the policy and all of its provisions began to run anew, and the suicide of the assured being within one year from the date of the reinstatement, there could be no recovery; and this policy, being issued by a Tennessee Corporation, the interpretation of the Supreme Court of Tennessee on the question became a part of the policy to the same extent as if written therein, and the judgment of the Supreme Court of Arkansas holding to the contrary is a violation of Article 1, Section 10, of the Federal Constitution forbidding the impairment by a State of the obligations of contracts and of the Fourteenth Amendment of the Federal Constitution forbidding the taking of property without due process of law in that such judgment failed to give appellant the benefit of a contract which was plain and unambiguous.

4. The judgment of the Supreme Court of Arkansas in this case violates the Constitution of the United States in the following particulars:

(1) Article 4, Section 1:

> "Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Section 6132 of the Code of Tennessee for 1932 expressly provides that appellant shall not discriminate between policy holders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennessee, both by the above Section of Tennessee Code and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, and, in violation of both statutes, to make the same identical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas statute, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the decision in *Galbraith* v. *Insurance Co.*, 115 Tenn. 477, holding that under the language of this particular policy, it began to run anew from the date of the reinstatement, constitutes a judicial proceeding, which became

a part of the contract itself, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, nor give "full faith and credit" to either.

(2) The interpretation of the Tennessee Supreme Court in *Galbraith* v. *Insurance Company*, supra, became a part of this policy and this later decision and judgment of the Arkansas Supreme Court giving the contract an entirely different meaning constitutes a "subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void", as was held in *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24:793, 798).

Section 10, Subsection 1, of the Federal Constitution provides: "No State" shall make a law impairing the obligation of contracts and the Fourteenth Amendment expressly prohibits "any state" from taking property without due process of law. The word "State" includes both the Legislative and Judicial Departments.

A judgment of a Court may violate the Constitution in the same manner as the Act of the Legislature.

The above specification of errors are identical with the statement of the points upon which appellant gave notice that it intended to rely in this Court (p. 30-33 inclusive).

V.

ARGUMENT
SUMMARY OF ARGUMENT

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1 Section 10 of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

Point B

Prior to the issuance of the Policy, the Tennessee Supreme Court in *Insurance Company* v. *Galbraith,* 115 Tenn. 471, had held that a lapsed policy when renewed became a new contract from the date of the reinstatement, and this decision as applied to a policy issued thereafter became a part of the policy contract to the same extent as if written in full therein.

Point C

Section 6132 of Tennessee Code and Section 322 of the Insurance Laws of Arkansas both make it unlawful for appellant to pay an Arkansas policyholder where a Tennessee policyholder is denied the right to recover under the same facts and the same policy, and consequently the judgment of the Supreme Court of Arkansas is unconstitutional under Article 4, Section 1 of the Constitution of the United States in that said judgment denies appellant

full faith and credit to public acts, records and judicial proceedings of every other State, under Article 4, Section 1 of the Federal Constitution.

Point D.

The judgment of the Supreme Court of Arkansas in this case compels the appellant to pay a judgment which under like circumstances could not be rendered for or paid to a citizen of Tennessee, constituting an unlawful discrimination under Section 6132 of the Code of Tennessee for 1932, and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, subjecting appellant to the penalties of the Statutes of both States, which impose fines and the penalty of cancellation of its license and a refusal to renew its license under such circumstances, and such judgment is unconstitutional under the Due Process Clause of the Fourteenth Amendment as taking property without due process of law.

Point A

Section 6155 of Crawford & Moses' Digest of the Statutes of Arkansas is unconstitutional in toto under the Due Process Clause of the Fourteenth Amendment and of Article 1, Section 10, of the Federal Constitution, forbidding the impairment of the obligations of contract by a State, or, if not in toto, then it is unconstitutional when applied to a case where there is no evidence of bad faith in refusing to pay the claim and resisting it in Court.

This Court had before it, in the case of *Supreme Ruling of the Mystic Circle* v. *Snyder*, 227 U. S., 500, 57 L. Ed., 614, the exact question presented in this case. The Tennessee statute provided a penalty against insurance companies where the failure to pay was in bad faith, and, notwithstanding this provision, it was contended that the effect of the Tennessee statute was to penalize insurance companies merely because a judgment might be rendered against them. To show that this Court understood the contention as we have thus stated it, we quote the following:

> "But we are asked to look behind the language of the statute and to assume that its effect is to impose the additional liability in the *absence of bad faith*. That is, we are to take the statute as including what it expressly excludes—as allowing what it explicitly denies. The act does not make the *mere refusal to pay* sufficient evidence of bad faith, so as to justify the added recovery; it requires that the *bad faith be shown*, and that the *consequent additional loss be shown*. And the State Court so construed the statute in the application that was made of it in the present case."

In order to show that the Court in the above case consid-

ered the very point presented in this case, we quote the following:

> "The statute is aimed, not at the rights secured by the contract, but at *dishonest methods* employed to defeat them. The additional liability is attached to *bad faith alone*. This is the necessary effect of the proviso. It is only when it is 'made to appear to the Court or jury trying the case that the refusal to pay said loss was *not in good faith*' that the added recovery may be had. It must also appear that such refusal *inflicted* '*additional expense, loss, or injury*' upon the policyholder, and it is this *further expense, loss or injury* that *measures* the amount to be allowed, which is not to exceed 25 per cent of the liability on the policy.
>
> "It cannot be said that this effort to give indemnity for the *injuries* which would be *sustained* through *perverse methods* and through an *abuse* of the *privileges accorded to honest litigants* imposed a burden upon the enforcement of the contract. Neither the contract nor the existing law which entered into it contemplated contests *promoted in bad faith*, or justified the *infliction of loss* by such means. The State was entitled at all times to take proper measures to prevent the *perversion* of its *legal machinery*, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be *availed of bona fide*."

This Court also had this question before it as applied to the right to resort to Federal Courts in the cases of *Terral* v. *Burke Construction Company*, 257 U. S. 529, 66 L. Ed. 352, and *Mortensen* v. *Security Insurance Company*, Adv. Sheets, Vol. 77, No. 11, 673.

In *Terral* v. *Burke Construction Company*, supra, this Court held that a legislative act denying to a foreign corporation, under the penalty of the cancellation of its license,

the right to resort to a Federal Court or to remove a case to a Federal Court was unconstitutional.

In *Mortensen* v. *Security Insurance Company*, supra, this Court applied this same principle of law to a State anti-removal statute as applied to a foreign insurance company and held the statute unconstitutional.

These two last cases clearly hold that a State statute having for its object the denial of the right to a litigant to resort to a Federal Court is unconstitutional under the Fourteenth Amendment, and likewise for the same reasons, it is clear that the same rules of law would apply to the right of a citizen to apply to State Courts either in the assertion of or in the defense of any right which it, in good faith believes, constitutes a good cause of action or a good defense.

This is the view taken of this Arkansas penalty Statute by the United States Circuit Court of Appeals of the Eighth Circuit in the cases of *Standard Accident Insurance Company* v. *Rossi*, 35 F. (2) 667, and *Intersouthern Life Insurance Company* v. *McElroy*, 38 Fed. (2) 557, in which the Court expressed the opinion that this penalty statute was unconstitutional when applied to cases where the refusal to pay or the defense of the suit was not in bad faith. Showing that the Arkansas Supreme Court recognized the law on this question as laid down by the United States Circuit Court of Appeals for the Eighth Circuit, the following is copied from its opinion in the present case, Record, page 19:

> " * * * assuming appellant defended in good faith, this does not excuse it from the plain provisions of the statute. *Security Ins. Co.* v. *Smith*, 183 Ark. 254, 35 S. W. (2d) 581; *Mut. Life Ins. Co.* v. *Marsh*, 185 Ark. 332, 47 S. W. (2d) 585, *where we expressly refused to follow the Circuit Court of Appeals in Standard Acc. Ins. Co.* v. *Rossi*, 35 Fed. (2d) 667, and *Inter-*

Southern Life Ins. Co. v. *McElroy*, 38 Fed. (2d) 557. This question is now settled and we decline to reconsider the matter."

We, therefore, submit that this penalty statute of Arkansas is unconstitutional in toto because it makes no provision for excepting those cases where the refusal to pay the claim or the defense of the suit was not in bad faith; if not in toto, then it is unconstitutional as applied to a case showing no evidence of bad faith in refusing to pay the claim or in resisting its payment in Court.

The appellee in its brief, submitted in support of its motion to dismiss this appeal, relied upon the cases of *Fidelity Mutual Life* v. *Mettler*, 185 U. S. 308, *Iowa Life* v. *Lewis*, 187 U. S. 335, *Home Life* v. *Fisher*, 188 U. S. 528, and *Farmers and Merchants Insurance Company* v. *Dobney*, 189 U. S. 301. None of these cases considered the questions here involved, but were decided upon two other questions:

1. That a State has the right to prescribe whatever conditions it may deem proper as a condition precedent to a corporation of another State entering the State to do business; and,

2. That the placing of a penalty upon insurance companies and no other class of corporations was a class distinction forbidden by the Federal Constitution.

In the case of *Security Mutual Life* v. *Pruitt*, 202 U. S. 264, 50 L. Ed., 1013, this Court held that a State had the right to prescribe as a condition precedent to its admission into the State that it would not remove a case from the State to the Federal Court, but in *Terral* v. *Burke Construction Company*, 257 U. S., 529, 66 L. Ed., 352, this Court reversed that ruling, and held that the right of corporations

to resort to a Federal Court could not be abridged by a State statute on the ground that it was a condition precedent to admission to the State. In *Mortensen* v. *Security Insurance Company*, decided on March 27, 1933, Advance Sheets, Vol. 77, No. 11, page 673, this Court expressly held that a State could not prescribe as a condition precedent to admission to the State the condition that an insurance company should not remove a case from a State to a Federal Court.

We, therefore, submit that the above cases relied upon by appellee are no longer applicable so far as relates to the right of an insurance company to resort to any Court in order to defend a suit in good faith.

Likewise, the case of *Zioux County* v. *National Surety Co.*, 276 U. S. 239, 72 L. Ed. 549, likewise relied upon by appellee, has no bearing upon the contention here made. That case related to the right of the attorneys for the county to have taxed as cost an attorneys' fee, as authorized by Section 6193 of the Nebr. Comp. Stat. The United States Circuit Court of Appeals for the Eighth Circuit held that, inasmuch as Rev. Stat., Sec. 823 and 824 provided *what costs* should be taxed against litigants in the Federal Court, a State statute in reference to costs would have no application. This Court reversed the Court of Appeals on this point. However, the following shows that we have correctly stated the point upon which the Court decided the case:

> "In striking down so much of the judgment as allowed an attorney's fee the Court below was persuaded that Sec. 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the State Court. As costs in the Federal Courts are regulated exclusively by Rev. Stat., Sec. 823 and 824, the Court concluded that other costs authorized only by a State statute, could not be included in the judgment."

It will thus be seen that this Court in none of the cases mentioned above, relied upon by appellee, considered or decided the point that a State statute could not authorize the assessment of penalties or attorney's fees against an insurance company merely because a judgment might be rendered against it, and without reference to its bad faith in denying payment of the claim and resisting suit in Court.

When we consider that it is only by executions and other processes of Courts that property may be taken, it ought to be clear that the right to resort to Courts honestly and in good faith is the very essence of the Fourteenth Amendment. By a long line of judicial decisions, the maxim of law has been thoroughly established that the right to tax or the right to regulate is the right to destroy, and, accordingly, if a State Legislature may impose a penalty merely because a judgment is rendered against an insurance company, it could go further and deny such company the right to resort to Courts at all either in the assertion or defense of its rights. If this could be done, the Fourteenth Amendment would be a useless scrap of paper.

Prior to the present case, the Supreme Court of Arkansas had not decided the question of whether or not a lapsed policy began to run anew from the time of the reinstatement as was held by the Tennessee Supreme Court in *Galbraith* v. *Insurance Company*, supra. The appellee contended below in his brief in support of his motion to dismiss this appeal that the cases of *New York Life Insurance Company* v. *Adams*, 151 Ark. 123, *Sec. Life* v. *Leeper*, 171 Ark. 77, and *Equitable Life* v. *King*, 178 Ark. 293, did in fact decide this question adversely to the contentions of appellant; that is, it held that a lapsed policy when reinstated did not begin to run anew from the date of the reinstatement.

The question in those cases was whether or not after a policy had lapsed, the company could impose any *new conditions* as a condition precedent to reinstatement. The points here involved were not discussed at all, that is, the meaning of the terms of the original policy construed in the *light of Tennessee decisions*, and especially in reference to the said anti-discrimination statutes of Tennessee and Arkansas. Accordingly, it is clear that the point involved in this suit had not prior to the present case been decided by the Supreme Court of Arkansas.

Point B

Prior to the issuance of the policy, the Tennessee Supreme Court in *Insurance Company* v. *Galbraith*, 115 Tenn. 471, had held that a lapsed policy when renewed became a new contract from the date of the reinstatement, and this decision as applied to a policy issued thereafter became a part of the policy contract to the same extent as if written in full therein.

In *Insurance Company* v. *Galbraith*, supra, the Tennessee Supreme Court said:

> "It is well settled that a policy is forfeited by its terms if the premium (or any note given for it) is not paid at maturity. *Thompson* v. *Life Ins. Co.*, 104 U. S., 252, 86 L. Ed., 765; *Ressler* v. *Life Insurance Company*, 110 Tenn., 411, 75 S. W., 735.
>
> "The effect of nonpayment of the premium is made clear by the policy itself. As is said in *Lantz* v. *Insurance Co.*, 139 Pa., 546, 21 Atl., 81, 10 L. R. A., 577, 23 Am. St. Rep., 202: 'It declares that, if not paid on the days named and in the lifetime of the insured, the policy shall cease and determine. . . . It ceases to bind the company and to protect the assured, and this without any act or declaration on the part of the former. It

does not require a formal forfeiture. . . . As to him (the assured) it is a dead policy. It is true that it may be restored to life by the subsequent payment of the premium and its acceptance by the company. This, however, is a new contract, by which the company agrees in consideration of the premium to continue in force a policy which had previously expired; in other words, it is a new assurance, though under the former policy.'

"This it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question; and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the conditions upon which it could be kept alive he has *ipso facto* forfeited all rights under the policy. As to him, it is as if it had never been written. If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a new assurance—a new contract—as if the policy then was for the first time issued. If this be its nature, then it must operate in the future from the date of its reinstatement, and whatever might be its original date, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract. And it would seem also to be as certainly true that if the assured obtained the reinstatement by fraud, or by false warranties material to the risk, during the period reserved for contest, the company should be allowed to protect itself against such unfair dealing.

"In *Bottomley* v. *Insurance Company*, 170 Mass., 274, 49 N. E., 438, it is said that a revived policy of life insurance does not go into effect if a declaration or warranty contained in the application therefor is un-

true. This statement, however, must be taken with the modification that if the policy contains a time limit, beyond which it is incontestable, when that limit is passed, then, unless fraud is within the class excepted from the operation of the clause fixing the limit, it is no longer a defense, but the policy is then affected notwithstanding the fraud."

The law is well settled that, where the language of an insurance policy has been construed by the Supreme Court of the Home State of the corporation, the *interpretation* placed by that Court upon such language becomes as much a *part of the policy* as if it were expressly *set out therein*, as held by the following cases:

Armour Packing Co. v. *U. S.*, 82, C. C. A., 135, 153 F. 1, Eighth Circuit, 14 L. R. A. (N. S.), 415:

"But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and *material* part of the contract That rule is that *all laws* in existence when an *agreement is made* necessarily *enter into and form* a part of it as fully as if they were *expressly referred to or incorporated into its terms. Von Hoffman* v. *Quincy* (*United States ex. rel. Von Hoffman* v. *Quincy*), 4 Wall., 535, 550, 18 L. Ed., 403, 408; *Rees* v. *Watertown*, 19 Wall., 107, 121, 22 L. Ed., 72, 76; *Edwards* v. *Kearzey*, 96 U. S., 595, 601, 24 L. Ed., 793, 796; *Seibert* v. *Lewis* (*Seibert* v. *United States*), 122 U. S., 284, 295, 30 L. Ed., 1161, 1165, 7 Sup. Ct. Rep., 1190; *Southern R. Co.* v. *Bouknight*, 30 L. R. A., 823, 17 C. C. A., 181, 185, 25 U. S., App., 415, 70 Fed., 442, 446."

Seibert v. *U. S.*, 122 U. S., 284, 30 L. Ed., 1165:

"It is well settled by the decisions of this Court that

> 'The remedy subsisting in a State, when and where the contract is made and is to be performed, is a *part of its obligation*, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution and is therefore void.' *Edwards* v. *Kearzey*, 96 U. S., 595, 607 (24: 793, 798)."

Therefore, as to all Tennessee policy holders under policies issued after the above decision, the policy began to run anew from the date of the reinstatement, and where death by suicide occurred within one year from said date, there could be no recovery, for the reason that the decision in the Galbraith case became a part of each policy issued thereafter to the same extent as if copied in full therein.

Point C

Section 6132 of Tennessee Code and Section 322 of the Insurance Laws of Arkansas both make it unlawful for appellant to pay an Arkansas policy holder where a Tennessee policy holder is denied the right to recover under the same facts and the same policy, and consequently the judgment of the Supreme Court of Arkansas is unconstitutional under Article 4, Section 1, of the Constitution of the United States in that said judgment denies appellant full faith and credit to public acts, records and judicial proceedings or every other State.

Section 6132 of the Tennessee Code of 1932 provides:

> "No Discriminations in Favor of Insurants Allowed; Contract to Be Expressed in Policy.—No life insurance company doing business in Tennessee shall make or permit any distinction or discrimination between insurants of the same class and equal expectation of life

in the amount or payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as an inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance."

Therefore, as to Tennessee policyholders, there could be no recovery under the facts of the present case; for the reason that the suicide occurred within one year from the date of the reinstatement, and, if the Company had paid this claim to a citizen of Arkansas on the theory that the suicide clause began to run from the date of the policy, and not from the date of the reinstatement, a discrimination against Tennessee policyholders would result, and appellant would clearly be in violation of the above Tennessee statute and be liable to fine and to have its license revoked.

Section 322 of the Digest of Insurance Laws of Arkansas, being Sec. 10 of the Act 493 of 1921, is as follows:

"It shall be unlawful for any life insurance company doing business in this State to *permit distinction or discrimination* between *individuals of the same class or of equal expectation of life* in the amount of payment of *premiums, rates, dividends, benefits, terms* or *conditions* of contracts of life or endowment insurance; nor shall any life insurance company, or agent thereof, make any contract except as is plainly expressed in the policy of insurance; nor shall any life insurance com-

pany, officer or agent thereof, pay, offer to pay, directly or indirectly, as an inducement to insurance, any rebate of premiums on the policy of insurance, or any other thing of value whatsoever not specified in the policy contract. Any company or agent violating the provisions of this Section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and the Commissioner shall cancel the right of the company, or agents convicted, to transact business in this State for a period of one year. Provided, the company shall not be held liable under this Section for any act of its agents unless such act was authorized by one of its officers, State managers, State or general agents.—Sec. 10, Act 493, of 1921."

It will be noted that the Tennessee and Arkansas statutes above quoted are in almost identical language, both expressly prohibiting under extreme penalties, appellant from *discriminating between policyholders*. It will also be noted that the prohibition under the Arkansas statute does not limit this discrimination to *Arkansas policyholders*, but to policyholders in general. Accordingly had appellant paid the present claim, it, as aforesaid, would have been a discrimination against Tennessee policyholders, and it would have violated both the Tennessee and Arkansas statutes.

In other words, the same identical contract with the same identical words would mean one thing in Tennessee and another in Arkansas, which necessarily means that the Arkansas policyholder would be paid a claim denied to the Tennessee policyholder, thus presenting a clear case of discrimination.

By paying this claim, thus discriminating against Tennessee policyholders and violating both of the said anti-

discrimination statutes of Arkansas and Tennessee, appellant would have created a situation where it would have violated the above Tennessee statute, and would under the Arkansas statute have subjected itself to a fine of $100.00 to $500.00, and where it would be mandatory upon the Commissioner of Insurance of Arkansas to cancel appellant's rights to do business in that State.

Article 4, Section 1, of the Federal Constitution is as follows:

> "Section 1. Full faith and credit shall be given in each State to the *public acts*, records, and *judicial proceedings* of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

The Public Acts of Tennessee, Sec. 6132, expressly provides that appellant shall not discriminate between policyholders and the interpretation of the contract in this case by the Arkansas Supreme Court compels this Company to pay a claim in Arkansas that it is expressly forbidden to pay in Tennessee, both by the Tennessee and Arkansas anti-discrimination statutes, and in violation of both statutes to make the same identical contract with the same identical words mean one thing in Tennessee and another in Arkansas. Appellant had a vested right not only in this contract as construed under Tennessee law which it was compelled under the Tennessee anti-discrimination law to apply equally among insurants, but it also had a vested right in the said Arkansas anti-discrimination law, in that the Supreme Court of Arkansas could not constitutionally compel it to do a thing which under the Arkansas and Tennessee statutes, subjected it to severe fines, and made mandatory the cancellation of its right to do business in that State. Also the

decision in *Galbraith* v. *Ins. Co.*, 115 Tenn., 477, holding that under the language of this particular policy, it began to run anew from the *date of the reinstatement*, constitutes a judicial proceeding, which *became a part of the contract itself*, as has been before stated. Accordingly, the Supreme Court of Arkansas did not follow either the Public Acts or the judicial proceedings of the State of Tennessee in this matter, nor give "full faith and credit" to either.

Point D

The judgment of the Supreme Court of Arkansas in this case compels the appellant to pay a judgment which under like circumstances could not be rendered for or paid to a citizen of Tennessee, constituting an unlawful discrimination under Section 6132 of the Code of Tennessee for 1932, and Section 322 of the Digest of Insurance Laws of Arkansas, being Section 10 of Act 493 of 1921, subjecting appellant to the penalties of the statutes of both States, which impose fines and the penalty of cancellation of its license and a refusal to renew its license under such circumstances, and such judgment is unconstitutional under the Due Process Clause of the Fourteenth Amendment as taking property without due process of law.

Section 6100 of the Tennessee Code of 1932 expressly provides that the license of a domestic insurance company may be revoked where it violates the law or does not comply with the law, and Section 5958 of the Arkansas Code is substantially the same.

Accordingly, the judgment in this case, compelling the appellant to pay a citizen of Arkansas the claim under this policy when under the same state of facts a citizen of the State of Tennessee could not be paid, compels appellant to

violate both the anti-discrimination statutes of Tennessee and of Arkansas.

Insurance companies are under the absolute control of two independent State agencies, both of whom they must obey:

1. The Insurance Commissioner of each State, who under the above Section is vested with the summary power to cancel licenses and to refuse to renew licenses; and,

2. The Courts, under whose execution the property of the Company may be taken.

If the Insurance Commissioner of Tennessee should cancel the license of appellant or attempt to cancel its license because, under the judgment in this case, it had discriminated against a Tennessee policyholder in favor of an Arkansas policyholder of the same class by paying a citizen of Arkansas a claim that could not be paid to a citizen of Tennessee, it would be no defense that this Company acted under the compulsion of a judgment of the Supreme Court of Arkansas.

Accordingly, the situation is that this judgment compels appellant to violate both the Tennessee and Arkansas anti-discrimination statutes, and we submit that any judgment of any Court that requires a litigant to violate the statutes expressly made in such cases, is unconstitutional under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

It is earnestly insisted by appellant, Life & Casualty Insurance Company of Tennessee, that the decree and judgment of the Supreme Court of Arkansas sustaining the validity of Section 6155 of Crawford & Moses' Digest of the

Statutes of Arkansas, as applied to the facts of this case, is erroneous and that said Act and the judgment herein is repugnant to the respective clauses of the Federal Constitution as hereinbefore set out.

We, therefore, respectfully ask that the judgment of the said Arkansas Supreme Court be reversed and judgment entered here for the appellant, Life & Casualty Insurance Company of Tennessee, so as to correct such errors.

Dated this 19th day of October, 1933.

Respectfully submitted,

MOREAU P. ESTES,
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Attorneys for Appellant,
Life & Casualty Insurance Company
of Tennessee.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

Nos. 89 and 509

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

OSSIE McCRAY, Appellee

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Appellant

v.

ALBERT BAREFIELD, Appellee

MOREAU P. ESTES,
P. M. ESTES,
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Attorneys for Appellant,
Life & Casualty Insurance Company of Tennessee.

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PROPOSITION 1

The question involved in these two cases is the constitutionality of the penalty statute of Arkansas which is Section 6155 of Moses and Crawford Digest of that State.

There is also involved in each case on the merits questions relating to the rights of the parties under the contracts as related to certain statutes of both Tennessee and Arkansas. The rule is, as announced by this court in *Scott* v. *Donald*, 165

U. S. 71, 41 L. Ed. 633, that where a case is properly before the Court on a question of constitutional law, involving a state statute, the Court will determine all other questions in the case whether amply raised or not as shown by the following language:

> "It is also argued that the amounts involved in the respective suits were not sufficient to give jurisdiction to the Circuit Court. Although the question of the jurisdiction of the Court below has *not* been certified to us in the manner provided by the 5th section of the Judiciary Act of March 3, 1891, yet, *as the case is before us,* in a case in which the law of a state is claimed to be in contravention of the Constitution of the United States, under another clause of that statute, we have jurisdiction of the *entire* case and of *all questions involved in it. Horner* v. *United States,* 132 U. S. 570 (36:266); *Carey* v. *Houston & T. C. R. Co.,* 150 U. S. 181 (37:1044); *Chappell v. United States,* 160 U. S. 499 (40:510)."

PROPOSITION 2

Insurance Companies are in a legislative straight jacket.

The different State Statutes prescribe the amount of capital stock that must be paid in before any business is done; the character of assets in which the funds must be invested; reserves must be carried to mature each policy; and no contract can be issued unless it is submitted to the different insurance departments and approved. Assets, which are as a matter of fact good and solvent, are not allowed to be counted among admitted assets, unless they come within the terms of the different State investment statutes.

We particularly call the Court's attention to that class of

State statutes, uniform generally in the different States, (in Tennessee being Section 6132 of the Code of 1932 and in Arkansas Section 322 of the Insurance Laws of Arkansas being Section 10 of Act 493 of 1921, which statutes are copied in full in Appellant's brief opposing Motion to Dismiss the Appeal, and being on page 10 and 11 of said brief), which prohibit any *discrimination* between insurants of the same class as to the terms and conditions of the policy and require every insurance contract to be *in writing* and that nothing shall be considered a part of the contract "not specified in the policy contract of insurance." These statutes are for the benefit of the *public* and the other *policyholders* of the Company. These other policyholders have invested their money in these insurance contracts on the theory that the law has required reserves to be carried as a *common fund belonging to all the policyholders,* out of which maturing policies shall be paid. If one policyholder is paid too much out of this common funds or paid out of it *when not* entitled to any payment, this fund is decreased and the rights and investments of the other policyholders are endangered.

The other policyholders are in effect interested parties in all law suits involving policies of the Company, and are entitled to have these statutes construed so as to protect their rights.

This exact question was before the Supreme Court of Louisiana in the case of *Shuff* v. *Life & Casualty Insurance Company,* 164 La. 741, 114 So. 637, in which the Court said:

> "The plaintiff urges and relies upon the proposition that the *agent's knowledge* that the insured was not in sound health on the date of the policy and at the time

when it was delivered was notice to the company, and that the agent did in fact waive the condition that the insured should be in sound health, and that the company was thereby deprived of the protection of that condition stated in the policy. The plaintiff's contention, therefore, stated broadly, is that, even though the insured was *aware* that the *agent* had no *authority* to dispense with or to *alter* any of the conditions of the policy, nevertheless the agent could confer the *authority* upon himself by merely disregarding *these conditions* and limitations expressed in the contract and known to the insured. The argument is not sound. It is the same as to say that it is *not competent* for an insurance company to *protect* itself against unauthorized acts of its agents by any condition or limitation of that kind expressed in its policy contracts. On the contrary, such limitations upon the authority of insurance agents are *not only reasonable* but *absolutely necessary* stipulations in a policy contract, to protect the *investors of their money in such companies against unauthorized transactions between faithless or careless agents and unscrupulous or indifferent patrons.* There is no *reason of public policy* why such conditions and limitations in a policy of insurance should be *nullified* by the courts, or be declared invalid, or be incompetent to protect either party to the contract."

The above Louisiana case, page 661, also holds:

"There is a statute (Act 52 of 1906, as amended by Act 227 of 1916), which declares that every policy of insurance issued by a life insurance company doing business in this state 'shall contain the entire contract between the parties.' The statute was intended, manifestly, not so much to protect the insurance companies as to protect the *policyholders*; for the statute goes further and provides that nothing shall be incorporated in any life insurance policy by reference to any constitution, or by-laws,

or rules, or the application for insurance, or any other writing, unless the same be *indorsed upon or attached to the policy when issued*; that all statements purporting to have been made by the insured shall, in the absence of fraud, be deemed representations and not warranties; that no statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless indorsed upon or attached to the policy when issued; and that any waiver of the provisions of the statute shall be void. There is *no reason*, however, why the statute, in so far as it declares that every life insurance policy shall constitute or contain the *entire* contract between the parties, should not be as effective in forbidding the *insured* as in forbidding the *company* to contradict the *written instrument* by *parol* or other *extrinsic* evidence. In *Fisett* v. *Mutual Life Insurance Co.*, 162 La., 620, 110 So. 880, it was held that the Act of 1916 was applicable as well to statements made in an application to establish a policy, or to place it in force after a failure to pay the premiums within the time required, as to statements made in the original application for insurance."

The rights of the parties are fixed by plain and unambiguous provisions of the policy and under plain and unambiguous statutes of both states, and these are the only evidence of the rights of the parties before the Court, and when the Supreme Court of Arkansas rendered a judgment contrary to this evidence under the provisions of the policy and under these statutes, such judgment is based upon no evidence and is void and unconstitutional under the case of *Woodson* v. *Railroad*, 134 U. S. 614.

By examining the cases of *Sturgis National Bank* v. *Maryland Casualty Company* (Mich.) 223 N. W. 367, and *Wilcox* v. *Mass. Protective Association* (Mass.) 165 N. E. 429, the Court

will see that this question has been dealt with in an able manner and the Court has held that statutory policies must be given the construction which their terms call for and that other rules of construction are not applicable such as being construed stronger against the insurer, etc.

As aforesaid, both the statutes of Tennessee and Arkansas require each company to file with the Insurance Department of the State a copy of each policy before issuing them, and when these policies are approved they become *statutory* policies and neither the assured thereunder nor the company issuing them may disregard their terms inasmuch as the rights of *other policyholders* are equally involved.

We submit that this is a clear statement of the relation of other policyholders to the general reserve fund of insurance companies, and that, accordingly, the Arkansas Supreme Court has no constitutional right to disregard these mandatory provisions of these statutes, and to enter a judgment requiring appellant to violate their provisions prohibiting discrimination between insurants of the same class, by paying out funds not due under the written contract which has been filed with and approved by the Insurance Department as required by law. While there is nothing in the record showing that these policies were filed with and approved by the Insurance Department, the law requires that this be done before they can be sold, and there is a presumption that the officials of a State do their duty, which would not be the case if these policies were allowed to be sold without the Department's approval.

It is respectfully submitted that this Court ought to hold

that the Arkansas penalty statute is unconstitutional in toto or unconstitutional when applied to a state of facts showing no want of good faith and that each case herein ought to be reversed and dismissed on the merits.

All *italics* are ours.

Respectfully submitted,

MOREAU P. ESTES,
P. M. ESTES,
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Attorneys for Appellant,
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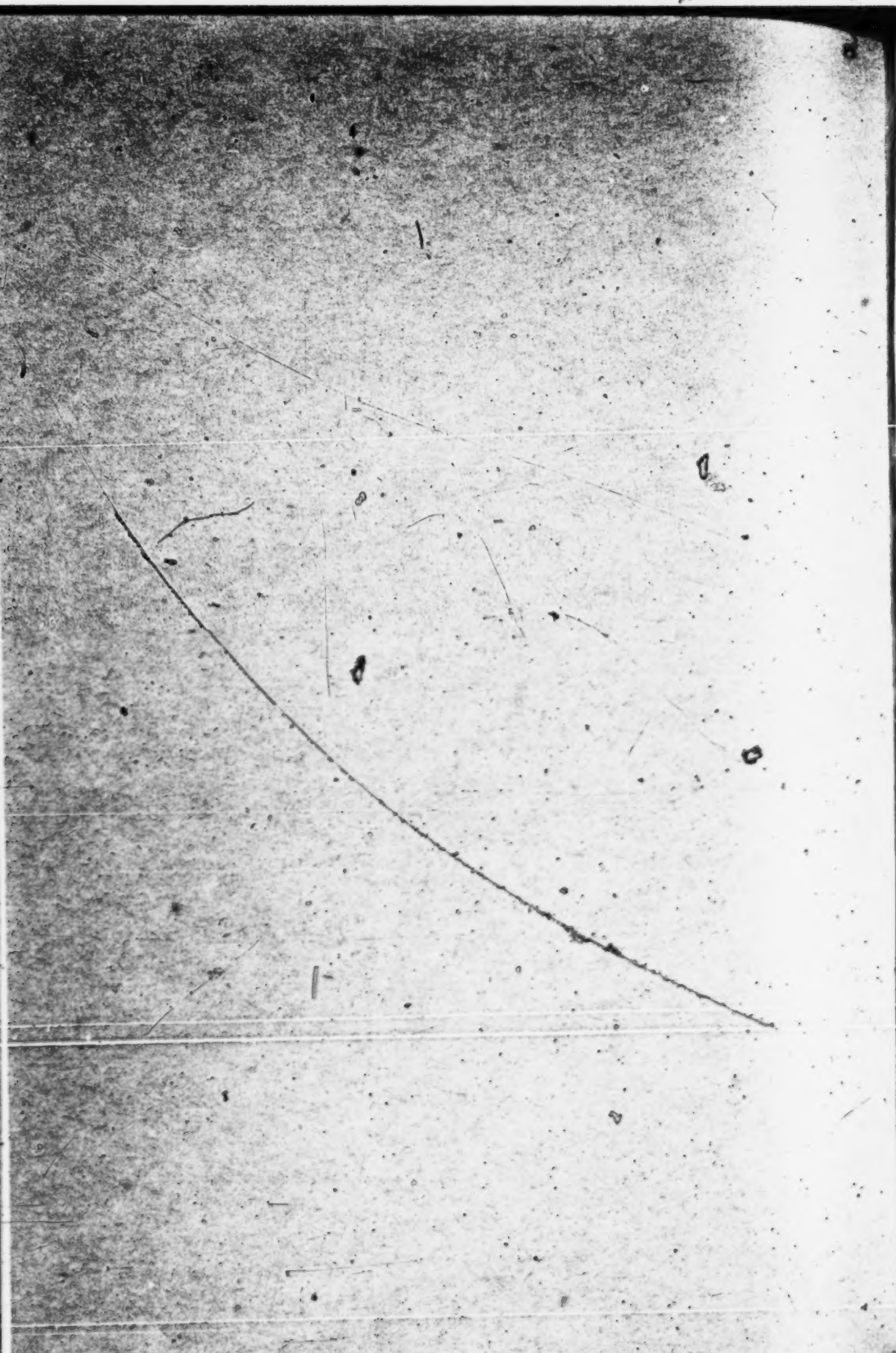
of Tennessee.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. [redacted] 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 994

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT IN OPPOSITION TO JURISDICTION AS PERMITTED BY RULE 12 AND MOTION TO DISMISS OR AFFIRM.

The policy here was an Arkansas contract, not a Tennessee contract.

The question at issue on the merits was whether a suicide clause in the policy precluding recovery except for premiums paid if suicide occurred within one

year from date of the policy ran from the date of the policy itself or ran from the reinstatement of the policy made under the terms of the policy.

The petitioner contends and cites the case of *The Insurance Company* v. *Galbraith*, 115 Tenn. 477, that where a policy lapses and is reinstated it becomes a new contract, and its date thereafter should be considered as the date of reinstatement, and that this interpretation of the policy became part of the policy to the same extent as if written therein, and it is stated that the appeal is based on the proposition, among others, that it was impairing the obligation of a contract, for the Supreme Court of Arkansas to hold in interpreting the contract that the suicide clause ran from the date of the original policy, and not from the date of the reinstatement, and the third assignment of errors is to this effect.

This contention is in conflict with the agreed statement of facts upon which the case was tried in the Circuit Court and in the Supreme Court of Arkansas.

Paragraph 1 of the Agreed Statement of Facts has this statement:

> "The policy was delivered in Fort Smith, Arkansas, to Jonas McCray after the date of said policy and while the said Jonas McCray was in good health, and that the first premium on said policy was paid at the date of its delivery. That said policy of insurance is an Arkansas contract."

Counsel are in error in stating that the three cases decided by the Supreme Court of Arkansas cited by them, to-wit:

New York Life Insurance Co. v. *Adams*, 151 Ark. 123; *Security Life Ins. Co.* v. *Leeper*, 171 Ark. 77, *Equitable Life* v. *King*, 178 Ark. 283, did not decide this precise question.

On the contrary the effect of those three decisions is that under the terms of such policy as the one at bar, the reinstatement provided therein, when effected, reinstated the original policy and the suicide clause therein ran from the date of the original policy. Thus in the *Leeper* case the court in 171 Ark. 77 at pp. 79 80 said:

> "The only provision in the policy now before us with respect to suicide related to the period running from the date of the original policy, and, since the policy gave an absolute right of reinstatement upon terms which did not include a new contract with reference to suicide, appellant had no right to impose that additional feature upon the assured in procuring reinstatement. The trial court was correct therefore in holding that the company was originally liable under the policy, notwithstanding the stipulation in the application."

A consideration of these cases which are cited in the opinion necessarily led the court to the following conclusion in the instant case:

> "There is no room for the contention that any new or different contract or policy was in force after reinstatement. By agreement between the parties, a forfeiture of the policy was set aside and the same contract was reinstated. No new policy was issued and none contemplated. By the express terms of the policy, it

> is provided that, 'If within one year from the date of issue of this policy, the insured shall * * * die by his own hand, the liability of the company shall be limited to the amount of the premiums paid hereon.' It does not provide that the company's liability shall be thus limited if the insured shall die by his own hand within one year from the date of reinstatement, should the policy lapse. Time is to be reckoned 'from the date of issue of this policy,' not from the date of reinstatement, nor from the date of any other policy. No doubt appellant could have so worded its policy, but it has not seen fit to do so."

Moreover, this question of impairing the obligation of the contract was not presented in the pleading in the trial court, or in the Supreme Court of Arkansas.

The Validity of Section 6155 of Crawford and Moses' Digest.

The validity of this section was not raised in the answer of the insurance company, but after trial and judgment, and a motion for a new trial on the merits, a supplemental motion for a new trial was presented to the circuit court raising the question of the constitutionality of Section 6155 of Crawford & Moses' Digest.

Section 3071 of the Statutes of Texas of 1895 reads as follows:

> "In all cases where a loss occurs, and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor,

> such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

This Court on May 5, 1902, sustained this statute upon the ground that the State may, as a condition of doing business within the State, impose on insurance companies obligation to pay damages and attorney's fees in case of default in the payment of their policy, and that the equal protection of the law is not denied by this statute imposing these penalties upon life and health companies, although the obligation is not imposed upon other classes of insurance companies.

Fidelity Mutual Life Assn. v. *Mettler*, 185 U. S. 308. In this case Justices Harlan and Brown dissented on the ground that this statute was only made applicable to two classes of life insurance companies and not to all doing a similar business.

This decision was approved in *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335, and *Home Life Ins. Co.* v. *Fisher*, 188 U. S. 726. This subject again came before this Court in 1903 in a similar statute from Nebraska, which was attacked on the ground that the statute was in violation of the Fourteenth Amendment, and the statute in that case was also sustained. *Farmers & Merchants Ins. Co.* v. *Dobney*, 189 U. S. 301.

This was the state of the law on March 29th, 1905, when the Arkansas Legislature passed an act which is now 6155 of Crawford & Moses' Digest, which act was in the exact words of the Texas statute construed

in the Mettler case, except the Arkansas statute added fire and accident insurance companies to the life and health companies provided in the Texas statute.

This statute was attacked before the Supreme Court of Arkansas in *Arkansas Insurance Co.* v. *McManus*, 86 Ark. 115.

The opinion of the court was written April 20th, 1908, by the then Mr. Justice McCulloch, later the Chief Justice, and still later the Chairman of the Federal Trade Commission.

This learned justice in his opinion reviewed the Mettler, Dobney and other cases in this Court, and also decisions of State courts on similar statutes. After reviewing the decisions of this Court on the subject, he stated that those decisions settled beyond doubt the question that the statute is not in conflict with the Federal Constitution, and that not being violative of "Equal protection of the law" and of "the due process of law" provisions of the Federal Constitution, it was difficult to see how any provision of the Constitution of the State, which in effect affords the same protection, could be violated.

In concluding the discussion, the opinion states:

> "These statutes are correctly based upon the theory that insurance companies, after loss occurs, have the insured at a great disadvantage, and are in position to inflict great damage by mere delay in payment of losses. Therefore it is neither unjust nor unreasonable to inflict a penalty which will in some degree compensate for that injury where the resisted claim is finally adjudged to be just, and which will also tend to deter the company liable from interposing unnecessary delay in settlement."

In *People of Sioux County* v. *National Surety Co.*, 276 U. S. 238, this Court reversed the Circuit Court of Appeals of the Eighth Circuit which affirmed a Nebraska case against said insurance company, but declined to enforce the Nebraska statute allowing attorneys' fees in the event of recovery, and stated: "State statutes allowing the recovery of attorneys' fees in special classes of actions have been upheld as constitutional by this Court," citing the Dobney and Mettler cases and quite a number of others, and stated:

> "In these cases the local statutes were in effect treated as creating a statutory liability in which insurers, by accepting risks after their enactment, had acquiesced, and for the liability thus assumed a remedy was available in the Federal as well as in the State Courts."

As seen, this statute was passed in 1905, and its constitutionality sustained in 1908. Therefore, every insurance company doing business in Arkansas since 1908, have in doing so, acquiesced in this act as creating statutory liability, for they accepted risks and received payments therefor in Arkansas; and the liability is thus assumed by them as a remedy available in the Federal as well as in the State Courts.

The appellant insists that it in good faith defended the suit, and to penalize it for so doing is to take its property without due process. It seeks thereby to sustain a will o' the wisp—its good faith—instead of the statute, but its good faith we question.

It argues here that its policy was a Tennessee contract, yet stipulated facts which made it an Arkansas

contract, and expressly agreed that it was an Arkansas contract, and now seeks in this Court another interpretation thereof, contrary to its own stipulation. Furthermore, still contending that it was a Tennessee contract and that the obligation thereof was impaired by this statute inflicting attorneys' fees and penalty for not paying its obligations in Arkansas when this statute had been in existence and sustained for many years prior to its doing its business in Arkansas.

Then it contends that the Arkansas Supreme Court has not passed on the question on the merits, that is, whether the limitation on the suicide clause ran from the date of the policy or the date of the reinstatement, yet shows itself familiar with the three Arkansas cases, all of which decide this question against it in principle, and one of them on exactly the same facts.

No Federal question was then raised on the merits of the issue for trial and only after it lost in the circuit court, it raised this question in a supplemental motion for a new trial as to constitutionality of statute for attorneys' fees and penalty.

In this record it is submitted that the conduct of the petitioner is such that even accepting the construction of this statute given by the Circuit Court of the Eighth Circuit, which the Arkansas Supreme Court has refused to follow, that that court would permit recovery of attorneys' fees and penalty, especially as the petitioner sought and has obtained a supersedeas not only of the $200.00 attorneys' fees and $60.00 penalty, but also of the $500.00 judgment on the policy.

A statement of these facts, it is submitted, indicates it is seeking not justice, but delay. However its good faith, if it possessed it, is immaterial.

The only case from this Court which it cites in support of its attack of the constitutionality of Section 6155 of Crawford & Moses' Digest is Supreme Ruling of *Fraternal Mystic Circle* v. *Snyder*, 227 U. S. 497.

Snyder, in 1887, bought a policy of life insurance payable to his wife as beneficiary. He died in 1908, and in a suit by the beneficiary against the company the trial court added 25 per cent penalty, pursuant to the statute of Tennessee, passed in 1901, authorizing such penalty where refusal to pay was not in good faith. The sole issue presented was whether this statute of 1901 impaired the obligation of the contract made in 1887, and the court held that it did not.

The company argued that many cases decided by this Court sustaining statutes for attorneys' fees and penalty where the insurance companies failed to pay on demand, and recovery was had for the full amount were sustained against the attack grounded on the 14th Amendment and was applied to cases arising after the statutes were enacted and sought to differentiate this case as without the many decisions of this court sustaining those statutes. The opinion cites many such cases, among others, the Mettler and Dobney cases.

It is apparent that this case does not in the remotest degree sustain the attack on the constitutionality of this statute passed in 1905, over 20 years before this policy was written, and many years after this company did business in Arkansas, with full knowledge of this

statute of the State, which had been sustained by its court.

Motion to Affirm or Dismiss.

The judgment should be affirmed and the penalty indicated in Rule 30, paragraph 2, applied. There is a difference in the cases as to whether the motion to affirm or motion to dismiss would be applicable under the facts appearing here, but as Rule 7, Paragraph 4 permits such motion in the alternative, that course is adopted and this motion made in that form.

Whether there was a federal question as to the validity of section 6155 of Crawford & Moses' Digest prior to 1902 when the similar Texas statute was held a proper exercise of State authority by this court, and not offensive to the federal Constitution is immaterial, because that decision and many others decided since and prior to bringing of this suit, in which this court has held statutes similar to the one at bar immune from attack under the due process, or any other clause of the federal Constitution, the raising of it again does not now present a federal question.

In Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, the court said:

> "From the analysis just made, it results that although a Federal Question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation

> or merit. This being so, the case is brought directly within the rule announced in *New Orleans Waterworks Co.* v. *Louisiana,* 185 U. S. 336-345."

The Louisiana case referred to was a discussion of frivolous and unsubstantial Federal questions, and this case is important as classifying as such a question one which has heretofore been directly decided by this Court. The Equitable case is applied in *Deming* v. *Carlisle Pkg. Co.,* 226 U. S. 102.

In *Consolidated Turnp. Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 598, the court said:

> "The bare claim that the judgment operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon which the claim must depend that the question is one real and substantial, and not so utterly without merit as to be frivolous, or a question concluded by previous decisions of this court," citing cases.

This case is approved and followed in *U. S. ex rel. Brown* v. *Lane,* 232 U. S. 598.

In *Williams* v. *U. S.,* 255 U. S. 336, the court said:

> "We do not pause to consider whether the constitutional validity of the Reed Amendment had been in terms so completely settled by the Clark Distilling Co. and the Hill Cases as to cause the contention here relied upon to be frivolous at the time the writ of error was sued out, but content ourselves with saying that, in

> any event, the want of merit in the constitutional question relied upon is so plainly and unequivocally established by the cases in question and the authorities which have followed them as to require us to do no more than direct attention to that condition, and consequently to affirm the judgment."

It would weary the court to pursue such cases further. It is respectfully submitted that the Federal questions sought to be reviewed are foreclosed by many decisions of this court and are frivolous and unsubstantial now, and the appeal is presented for delay and vexation and should be treated as such by affirmance with penalty or dismissal, as the court may see proper.

Respectfully submitted,

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Ossie McCray, Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY, APPELLEE

BRIEF OF APPELLEE

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY, APPELLEE

BRIEF FOR APPELLEE

Answering appellant's brief as summarized therein at pages 7-8:

Point A

The claim is that Section 6155 of Crawford & Moses' Digest (the attorney's fee and penalty statute) is unconstitutional under the Due Process clause of the Fourteenth Amendment and of Article 1, Section 10 of the Federal Constitution forbidding the impairment of a contract by a State.

In order to save repetition we request that our brief in "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm," pages 4 to 10, entitled "The Validity of Section 6155 of Crawford & Moses' Digest," be accepted as our reply to the brief on this subject.

There is the further answer that the charge that attorney's fee and penalty statute of Arkansas in insurance cases is in violation of Article 1, Section 10, of the Constitution against impairment of contracts, is that it was not raised in the pleadings in the lower court; and a further answer is that in the "Agreed Statement of Facts" copied in the record at pages 11-13, in paragraph 1, page 11, it is stated "That said policy of insurance is an Arkansas contract."

Our brief heretofore referred to, pages 1 to 4, presented the fact that it was an Arkansas contract; and gives the decisions of the Supreme Court of Arkansas construing this provision of the policy as to reinstatements (all of which were decided before the policy in this case was issued to McCray), wherein it was held that no new contract was made.

Point B

It is insisted that prior to the issuance of this policy, the Tennessee Court had held that a lapsed policy when reinstated became a new contract from the date of the reinstatement, and this decision as applied to a policy issued thereafter became a part of the policy contract to the same extent as if written in full therein.

If this was a Tennessee contract, instead of an Arkansas one, this might be a correct statement; but even if a Tennessee contract, the fact that it was claimed to violate the provisions of the Federal Constitution must have been affirmatively alleged in the lower court.

In the record, pages 2 to 4, is the Answer, which is that the company was not liable because the assured had violated the suicide clause, having committed suicide from one year from the date of reinstatement and the reinstatement was a renewal of the policy as a new contract and the suicide clause ran from reinstatement, not the original date; but did not aver that any contrary rulings would offend any provision of the Federal Constitution. The effect of the Answer was to limit recovery to premiums paid, $34.08.

In fact, no Federal question was raised until after the hearing, after the motion for a new trial (which in Arkansas is the assignment of error) had been made, which is set out at page 6 of the record; but thirteen days thereafter a supplemental motion was filed wherein Section 6155 of Crawford & Moses' Digest (the penalty statute) was attacked as contrary to the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause (R. pp. 7-9).

Not until the case got into this Court was it discovered that rendering judgment on this policy would be in conflict with any provision of the Federal Constitution; the only Federal question presented was as to attorney's fees and 12 per cent penalty.

Point C

It is insisted that the Tennessee statute makes it unlawful to pay this policy because differing from what the effect of a similar policy would be in Tennessee. This, like other phases of it, was not presented in the state courts and overlooks the fact that it was stipulated that this was an Arkansas contract.

Point D

This is another attempt to raise the point not heretofore presented, which is, that to pay this judgment would be unlawful discrimination under Section 6132 of the Code of Tennessee, subjecting the company to the penalties of the statutes of both states.

If it were open to the appellant to raise the question that the contract it made in Arkansas was in violation of the laws of Tennessee, the domicile of the company, the answer to it is given by Judge Thompson in his work on Corporations quoted in *Minneapolis F. & M. Mut. Ins. Co.* v. *Norman*, 74 Ark. 191, as follows:

> "And that, as the domestic citizen is not required to see that the foreign corporation has observed the laws before he enters into a contract with it, there is no reason, founded in public policy, which will enable a solvent foreign corporation, which has violated the domestic law in making contracts and receiving consideration therefor from an innocent citizen, to escape liability for its performances by setting up its own turpitude."

It is submitted that the appeal is taken for delay and has no merit to it.

Respectfully submitted,

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Appellee.

FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

Nos. 39 and 309

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Petitioner (Appellant)

v.

OSSIE McCRAY, Respondent (Appellee)

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, Petitioner (Appellant)

v.

ALBERT BAREFIELD, Respondent (Appellee)

PETITION OF THE LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE FOR A REHEARING

MORRAU P. ESTES,
P. M. ESTES,
MYRON T. NAILLING,
Attorneys for Petitioner (Appellant)
Life & Casualty Insurance Company
of Tennessee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

Nos. 89 and 509

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE, Petitioner (Appellant)

v.

OSSIE McCRAY, Respondent (Appellee)

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE, Petitioner (Appellant)

v.

ALBERT BAREFIELD, Respondent (Appellee)

PETITION OF THE LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE FOR A REHEARING

PETITION FOR REHEARING

Comes now the above-named Petitioner, the Life & Casualty Insurance Company of Tennessee, and presents this, its petition for a rehearing of the above entitled causes, and in support thereof, respectfully shows:

Neither party presented the points decided in brief or argument and neither this Court nor any other Court has ever raised them as relating to insurance penalty statutes. They are raised by the Court of its own motion and the authorities are the result of its own investigation. This decision is directly opposed to *St. Louis, Etc., Railroad Company* v. *Kane*, 224 U. S. 350, and *Pacific Mutual Life Ins. Co.* v. *Carter*, 92 Ark. 378, and not having been heard on these points we file this petition.

In disposing of this case (*McCray*) this Court said:

> " 'Penalty' is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state. There are other penalties designed as reparation to sufferers from wrongs. *Huntington* v. *Attrill*, 146 U. S. 657, 668; *Brady* v. *Daly*, 175 U. S. 148, 154, 157; *St. Louis, I. M. & S. Ry. Co.* v. *Williams*, 251 U. S. 63, 66; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 103. *One who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal.* It is no answer in such circumstances that he has acted in good faith. 'The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury *subsequently* estimates it, some matters of degree.' *Nash* v. *United States*, 229 U. S. 373, 377. Reparation may still be due, for all his good intentions, yet reparation within bounds. It is all 'a question of more or less.' *Sexton* v. *Kessler*, 225 U. S. 90, 98. The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open. *Ex parte Young*, 209 U. S. 123; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 661, 662. On the other hand, the penalty may be no more *than the fair price of the adventure.* *St. Louis, I. M. & S. Co.* v. *Williams*, supra, p. 66. *In that event, the litigant must pay for his experience, like others who have tried and lost.*"

This language unmistakably shows that this Court has held that whether or not attorneys' fees and penalties may be assessed under the Arkansas Penalty Statute, involved in this case, depends solely upon the fact that the litigation has resulted in a verdict against the Company. In other words, whether or not the attorneys' fees and damages may be as-

sessed depends upon the *end of the law suit.* This Court has entirely overlooked the insistence of your petitioner that whether or not attorneys' fees and damages may be assessed must be judged *solely* from the claim at the *time the demand is made, and before the suit is filed.*

It will be noted that this statute expressly provides that if the Company "shall fail to pay the same within the time specified in the policy, *after demand made therefor*", it shall be subject to have included in the final judgment attorneys' fees and damages. This contemplates that, before the damages and attorneys' fees may be awarded, the claimant shall make *demand* upon the company for payment, which necessarily carries with it the idea that he must at the *time of demand* present a *claim* setting out facts showing that the company *owes the amount demanded.*

If the claim presented, at the *time demand is made,* does *not on its face* show that the company *owes it,* the Fourteenth Amendment forbids the award of attorneys' fees or damages for a refusal to pay it.

The law contemplates that before penalties are awarded, the company must have an opportunity to pay the claim.

There is no real relation between the claim as demanded and the fact of final judgment on the policy against the company. The company may *not owe* the claim *as demanded,* yet a recovery may be had on the policy on an entirely different state of facts. When a claim is demanded showing that the company does not owe it, the law does not hold the claimant to the claim as demanded or require the claimant to file another

claim before bringing suit. It permits him to bring suit and recover judgment on an *entirely different state of facts.*

The company is not given an *opportunity* to pay the claim upon which the *judgment is rendered.*

The law even permits the claimant to *deny entirely* the facts in the claim demanded and to recover judgment on the policy, without making another demand or amending the one on file with the company.

This point is illustrated by the Tennessee case of *Robertson v. Insurance Company,* 6 Tenn. App. 59, where the policy provided that suicide within one year defeated recovery. Demand was made on a claim showing suicide within one year and payment was refused. Without amending the claim or filing a new claim showing a different state of facts, suit was brought under an allegation of facts totally denying the statement that the assured committed suicide, which was a complete denial of the facts stated in the claim as demanded. A recovery was had on the ground that the claimant was not bound by the statements in the claim at the time of the demand, but could shift his ground and make a total denial of such facts. Although a judgment was recovered, the penalty under the Tennessee statute was denied because the claim, as demanded, showed no liability.

The law on this subject is well stated in *Bacon on Life and Accident Insurance,* Fourth Edition, Section 560, as follows:

> "Proofs of Loss as Evidence.—The preponderance of authority is in favor of the view that proofs of loss are admissible in evidence for the sole purpose of showing

that the requirements of the policy concerning them have been complied with. But, although this is true, the *Supreme Court of the United States* has said that preliminary proofs, presented in compliance with a condition of the policy, are admissible as prima facie evidence of the facts therein against insured and on behalf of insurer. And if not contradicted require, if they show a breach of warranty or conditions of the policy, a judgment for defendant. These last mentioned cases and others hold that the statements made by the assured in the proofs of loss *are admissions*, and may be considered by the jury for what they are *worth*, and the modern rule is probably that the proofs of loss furnished by the assured are not only evidence that the condition of the policy requiring them has been complied with, but are also to be regarded as admissions and prima facie evidence of the facts therein stated. But the party furnishing them may show that statements in the *proofs of loss were erroneous* or *inadvertently made*, and the mistake can be shown *by parol.*"

The law is, therefore, clear that a claimant may make demand on one state of facts and after refusal is had and without making another demand, recover on the policy on an entirely *different state of facts.*

While this Court, as shown by the above authorities, permits a claimant to recover upon an entirely different state of facts than set out in his demand, it held in *St. Louis Railroad Company* v. *Wynne*, 224 U. S. 360, 56 L. Ed. 801, as shown by the following language, that the Fourteenth Amendment forbids the award of attorneys' fees and damages under the Arkansas penalty statutes, where the *claim as demanded* showed that it was *not* owed at that time:

"The owner of two horses which were killed within the state by a train of a railway company served upon the

company a written notice demanding damages in the sum of $500. The company refused to pay the demand, and after the expiration of thirty days the owner brought suit in a court of the state to recover his damages, alleged in the complaint to be $400. A trial to a jury resulted in a verdict for the owner, assessing his damages at the amount sued for, and the court, deeming the statute applicable, gave judgment for double that amount and for an attorney's fee of $50. The company objected that the statute, as thus applied, was repugnant to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, but the objection was overruled, and on appeal to the supreme court of the state the judgment was affirmed. 90 Ark. 538, 119 S. W. 1127, 17 A. & E. Ann. Cas. 631. The case is here on a writ of error to that court.

"It will be perceived that, while before the suit the owner demanded $500 as damages, which the company refused to pay, he did not in his suit either claim or establish that he was entitled to that amount. On the contrary, by the allegations in his complaint he confessed, and by the verdict of the jury it was found, that his damages were but $400. Evidently, therefore, the prior demand was excessive and the company rightfully refused to pay it. And yet, the statute was construed as penalizing that refusal and requiring a judgment for double damages and an attorney's fee. In other words, the application made of the statute was such that the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before the suit.

"We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law. It does not merely provide a reasonable incentive for the prompt settlement, without suit, of just demands of a class admitting of special treatment by the legislature, as was the case with the statute con-

sidered in *Seaboard Air Line R. Co.* v. *Seegers*, 207 U. S. 73, 52 L. Ed. 108, 28 Sup. Ct. Rep. 28, but attaches onerous penalties to the nonpayment of extravagant demands, thereby making submission to them the preferable alternative Thus, it takes property from one and gives it to another, not because of a breach by the former of a duty to the latter or to the public, but because of a lawful exercise of an undoubted right. *Plainly this cannot be done consistently with due process of law.* And, in principle, the supreme court of the state has so held since its decision in this case. In *Pacific Mut. L. Ins. Co.* v. *Carter*, 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, that court had occasion to consider a statute of the state providing that if a loss under a policy of insurance was not paid within the time specified, 'after *demand made therefor*', the company should be liable, in addition to the amount of the loss, to 12 per cent damages and a reasonable attorney's fee. An insured demanded in payment of a loss under such a policy the sum of $1,666.66, which the insurance company refused to pay, and in a suit on the policy, wherein it was found that the loss was but $1,444.44, the insured was awarded the statutory damages and an attorney's fee. That part of the judgment was reversed, and it was said:

" 'But the act makes the company liable for failure to pay the loss *"after demand made therefor."* The statute thus *contemplates that there shall be a demand.* A recovery for penalty and attorney's fee cannot be had when complainant makes demand for more than he is entitled to recover. It could never have been the purpose of the legislature to make the insurance companies pay a penalty and attorney's fee for *contesting a claim that they did not owe.* Such an act would be unconstitutional. The companies have the right to *resist the payment of a demand that they do not owe.* When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorneys' fee is for the benefit of the one who is only seeking to recover after demand what is *due him under*

the terms of his contract, and who is compelled to resort to the courts to obtain it'."

We note that this Court in the above decision quotes with approval from the Arkansas case of *Pacific Mutual Life* v. *Carter*, 92 Ark. 356, in which the Court was considering the Arkansas penalty statute here involved and held that where the company did *not owe* the claim *as demanded*, attorneys' fees and damages could not be awarded under the statute, and that a different construction would render the Act unconstitutional under the Fourteenth Amendment.

The Court will see that the proposition decided by this Court and the Arkansas Supreme Court in the above cases is exactly the one which petitioner is now insisting upon.

Accordingly, if these two cases are to be followed, the test to be applied to the present case is whether or not at the *time of demand* your petitioner *owed* the claim as set out in the demand.

The claim as demanded showed that the assured committed suicide within one year from the date of the reinstatement of the policy.

Your petitioner is a Tennessee corporation located at Nashville, Tennessee, and prior to the time this policy was issued the Tennessee Supreme Court in the case of *Insurance Company* v. *Galbraith*, 115 Tenn. 478, held, as shown by the following language, that where a policy lapsed and was reinstated its date thereafter should be calculated from the date of the *reinstatement* and not the date of the policy:

"This it seems to us, is a clear statement of the want of relationship of the parties during the lapse of a policy like the one in question, and of the character of the new relations which grow out of its reinstatement. While in a state of absolute collapse, the former owner of the policy has neither a legal nor an equitable claim on the company. By his failure to comply with the condition upon which it could be kept alive he has ipso facto forfeited all rights under the policy. As to him it is as if it *had never been written.* If any benefit is to accrue to him therefrom, it must be revitalized, and this can only be done with the consent of the company. When it is done, then it becomes a *new assurance—a new contract*—as if the policy *then was for the first time issued.* If this be its nature, then it must operate in the future from the *date of its reinstatement*, and whatever might be its *original date*, or howsoever long it may have run, yet it would seem, by the force of necessary logic, to follow that the incontestable clause would begin its new life with the date of the new contract."

This Court and both the Tennessee and Arkansas Supreme Court recognize the rule of law to be that the decision of the Supreme Court of a State interpreting the provision of a policy becomes a part of each policy thereafter issued to the same extent as if copied in full therein.

We quote from the following cases as sustaining this rule: *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 796:

"It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement."

Armour Packing Co. v. *U. S.*, 82 C. C. A. 135 (8th Circuit), 153 F. 1, Vol. 14, L. R. A. (N. S.), page 415:

> "But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and a material part of the contract. That rule is that all laws in existence when an agreement is made necessarily enter into and form a part of it as fully as if they were expressly referred to or incorporated into its terms. *Von Hoffman* v. *Quincy* (United States ex rel., *Von Hoffman* v. *Quincy*), 4 Wall. 535, 550, 18 L. Ed. 403, 408; *Rees* v. *Watertown*, 19 Wall. 107, 121, 22 L. Ed. 72, 76; *Edwards* v. *Kearzey*, 96 U. S. 595, 601, 24 L. Ed. 793, 796; *Seibert* v. *Lewis* (*Seibert* v. *United States*), 122 U. S. 284, 295, 30 L. Ed. 1161, 1165, 7 Sup. Ct. Rep. 1190; *Southern R. Co.* v. *Bouknight*, 30 L. R. A. 823, 17 C. C. A. 181, 185, 25 U. S. App. 415, 70 Fed. 442, 446."

Therefore, under these authorities the interpretation placed upon this policy in the *Galbraith* case became as much a part of the policy as if it was copied in full therein, and the policy, therefore, provided on its face that if it lapsed and was reinstated and suicide occurred within one year from the date of the *reinstatement*, no recovery could be had.

The claim at the time of demand showed that the assured committed suicide within one year from the date of the reinstatement, and, accordingly, was *not owed* by your petitioner, with the interpretation of the *Galbraith* case read into the policy, as must be done under the law.

Accordingly, the claim as demanded at the time of the demand was not owed by your petitioner, and the Fourteenth

Amendment as interpreted by this Court in *Railroad, etc.* v. *Wynne,* supra, and by the Supreme Court of Arkansas in *Pacific Mutual Life* v. *Carter,* supra, forbade the award of attorneys' fees and damages, and it is clear that the decision in the present case cannot be upheld unless these cases are either overruled or ignored.

There is yet a stronger reason why this claim at the time of the demand was not owed and why it could not be paid by the company, and that is, under both the Tennessee and Arkansas statutes payment *was absolutely forbidden.* If the company had paid it, it would have violated the laws of both States, been guilty of a misdemeanor and been subject to have its license revoked under both statutes.

The statutes of both States expressly set out *what claims* shall be paid and what claims *shall not be paid* and then expressly provide that any claim not legal thereunder must not be paid.

Both of these statutes expressly provide that no claim shall be paid (a) unless it is owed under the *written policy,* and (b) no payment can be made that constitutes a *discrimination* between insurants of the same class.

In Tennessee, the statute is as follows (Chap. 160, Acts of 1895, Sec. 28) :

> "*Be It Further Enacted,* That no life insurance company doing business in Tennessee shall make or permit any distinction or discrimination between insurants of the same class and equal expectation of life in the amount or payment of premiums, or rates charged for policies of

life or endowment insurance, or in the dividends or other benefits payable thereon, or any other of the terms and conditions of the contracts it makes; nor shall any such company, or any agent thereof, make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon or any valuable consideration or inducement whatever, not specified in the policy contract of insurance. It shall be unlawful for any insurance company or agent to pay or allow, or offer to pay, or allow as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any *valuable consideration* or inducement whatever, not specified in the policy contract of insurance. (As amended by Ch. 176, Acts of 1919): 'The penalty for violation of the foregoing section shall be the same as provided in Section 29, Chapter 160, of the Acts of 1895.' Ch. 176, Acts of 1919."

In Arkansas, the statute is as follows (Section 322 of the *Digest of Insurance Laws of Arkansas*, being Sec. 10 of the Act 493 of 1921):

"It shall be unlawful for any life insurance company doing business in this State to *permit distinction* or *discrimination* between *individuals of the same class or of equal expectaton of life* in the amount of payment of *premiums, rates, dividends, benefits, terms or conditions* of contracts of life or endowment insurance; nor shall any life insurance company, or agent thereof, make any contract except as is plainly expressed in the policy of insurance; nor shall any life insurance company, officer or agent thereof, pay, offer to pay, directly or indirectly,

as an inducement to insurance, any rebate of premiums on the policy of insurance, or any other thing of value whatsoever not specified in the policy contract. Any company or agent violating the provisions of this Section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and the Commissioner shall cancel the right of the company, or agents, convicted to transact business in this State for a period of one year. Provided, the company shall not be held liable under this Section for any act of its agents unless such act was authorized by one of its officers, State managers, State or general agents.—Sec. 10, Act 493, of 1921."

It will be noted that the legal effect of both statutes are the same and both use almost the same identical language.

Each other State has statutes of the same legal effect and in almost the identical language.

That this is true is due to the *nature* of insurance and the *relation* which it bears to its policyholders.

The business of insurance is in a legislative straight-jacket. Insurance companies have no rights of *free agency* such as are enjoyed by other corporations and individuals. They are not permitted to do business unless they have a certain amount of assets, free from all debts, which under the statutes of the several States is generally placed at $100,000.00. They are not permitted to invest its assets except in a certain class of securities. They are required to make annual reports to the Insurance Commissioner of each State, and, if it is found that their assets had not been invested as authorized or that

they do not have the stipulated amount of assets above all liabilities invested as the law requires, they will be wound up as insolvent concerns.

In order that they may have level premiums, they are required to charge each policyholder an amount *more than sufficient* to pay current losses, and this extra amount is required to be carried and kept intact as a reserve and as a *liability* against the company. This creates the reserve fund which is the *absolute property* of the policyholder and not of the company. The policyholder, as a matter of right, may withdraw his part of this fund at any time or may borrow it by giving his note secured only by the policy. The assets of the company consist almost entirely of these reserves owned by the policyholders and, where the company has a capital stock, it is only required as a margin of safety, inasmuch as it is known that some of their assets will prove worthless, and the capital stock is required to protect the policyholders against this deficiency.

Insurance is made possible by the phenomena of human experience, that so many people will die, and so many accidents will happen under given circumstances, and this has created the profession of insurance actuaries who graduate from universities in their profession in the same manner as do lawyers and doctors and members of other professions.

Mortuary and accident tables have been prepared by them showing exactly what premiums must be paid under given conditions in order to mature the policy and it is no more possible to vary this phenomena of human experience, upon which these tables are based, than it is to change the laws of gravitation or the ebb and flow of the tides. One is as

much due to *natural causes* as the other, and *no decree of a Court or Act of a legislature* can change their operation. Accordingly, each policyholder receiving the same benefit is required to pay the same premium, which will only pay for the benefits received. Accordingly if one policyholder is permitted to recover more from the reserve fund than he has paid for, it means that some other policyholder will receive less than he has paid for. For this reason, each State has passed laws almost identical with those of Tennessee and Arkansas copied above. These laws have for their object the preservation of the interest of each policyholder in the fund *held by the company* but *owned by the policyholders* and to assure that no policyholder will be discriminated against in the distribution of this common fund, belonging to *all the policyholders.*

In order to assure that no Company shall violate the natural laws governing the science of insurance, Tennessee and Arkansas and each other State have adopted a uniform code of laws, identical in legal effect and almost identical in words, prohibiting any insurance company from conducting its business in any other manner than required by these natural laws governing the number of deaths and the number of accidents under given circumstances, as shown by the insurance tables.

The science of insurance could not be carried out on a level premium basis, which is almost universally used, and which governs the policies involved in these cases, unless more were charged than necessary to pay current losses, thereby creating a common fund, called insurance reserves and belonging absolutely to the policyholders in proportion to the amount paid in under their policy contracts.

The assets of insurance companies consist almost entirely of these insurance reserves. If these insurance laws were not uniform and one State permitted an insurance company to pay out of this common fund more than the policyholder was entitled to under his written contract, this would destroy entirely the scientific scheme of insurance.

Each policyholder is given a policy, which shows his proportionate ownership in this fund and the manner of his participation, and all these laws of both States herein mentioned became a part of each policy to the same extent as if written in full on the face of each policy.

As a necessary incident to these laws, it is necessary that the rights of each party be reduced to writing and that no discrimination shall be permitted. Accordingly, the above statutes of Arkansas and Tennessee expressly provide that the policies shall be in writing and that no discrimination shall be had between policyholders of the same class. To enforce these provisions, in the same statutes, it is expressly provided that the payment to a policyholder not under the written contract is a misdemeanor and subjects the offending company to punishment as a misdemeanor to have its corporate existence ended and its license to do business cancelled. In order that the Insurance Commissioners of each State may judge whether or not these policies are drawn according to the mortuary and accident tables and the rights of each policyholder safe-guarded the statutes of the different States require that each policy shall be filed with the respective Insurance Departments *before issued* in the State and each State has provided actuaries to examine each policy to see that its premium is adequate for the liability assumed and that its provisions are fair to the public and in general that

it complies with the natural laws of insurance based on the death of individuals and the happening of accidents. The Arkansas law on this subject is as follows:

> "All forms of policy contracts of life, health and accident companies issued in the State, shall first be submitted to the Commissioner, and same cannot be issued in this State until they have been submitted to and received the approval of the Commissioner. Provided, the Commissioner shall approve any policy forms provided for or made legal by the laws of the State."

The Tennessee laws on this subject will be found in Tennessee Code, Section 6182.

This Court will clearly see that what a company charges as a premium, the benefits that it pays and its terms generally are not left to any extent to the companies but are absolutely fixed by the law and must be approved by the Insurance Departments before the policy can be sold. These policies are, therefore, *statutory*, are inflexible in their nature and the insurance companies have no right under severe penalties, either to *sell a different policy, or to pay out claims under a policy not authorized by the written terms of the policies as approved by the Insurance Department.* If this could be done, the effects of these laws would be defeated.

Therefore, an insurance company has no freedom of choice or judgment as to what capital it shall have or how its assets may be invested, or the policy *contracts it issues*, or the manner and means of their enforcement, or application or what claims it should pay and what it should reject.

The assets do not belong to the company and it has no control over their distribution. All of these things and matters are fixed by the statutes of the various States and the administration of these statutes are in the hands of the Insurance Commissioners of the various States. These State officials are given summary powers over the companies whenever any of these laws are not fully complied with.

These legal propositions have received judicial consideration in the following cases:

This exact question was before the Supreme Court of Louisiana in the case of *Shuff* v. *Life & Casualty Insurance Company*, 164 La. 741, 114 So. 637, in which the Court said:

> "The plaintiff urges and relies upon the proposition that the *agent's knowledge* that the insured was not in sound health on the date of the policy and at the time when it was delivered was notice to the company, and that the agent did in fact waive the condition that the insured should be in sound health, and that the company was thereby deprived of the protection of that condition stated in the policy. The plaintiff's contention, therefore, stated broadly, is that, even though the insured was *aware* that the *agent* had no *authority* to dispense with or to *alter* any of the conditions of the policy, nevertheless the agent could confer the *authority* upon himself by merely disregarding *these conditions* and limitations expressed in the contract and known to the insured. The argument is not sound. It is the same as to say that it is *not competent* for an insurance company to *protect* itself against unauthorized acts of its agents by any condition or limitation of that kind expressed in its policy contracts. On the contrary, such limitations upon the authority of insurance agents are *not only reasonable* but *absolutely necessary* stipulations in a policy contract, to

protect the *investors of their money in such companies against unauthorized transactions between faithless or careless agents and unscrupulous or indifferent patrons.* There is no *reason of public policy* why such conditions and limitations in a policy of insurance should be *nullified* by the courts, or be declared invalid, or be incompetent to protect either party to the contract."

The above Louisiana case, page 661, also holds:

"There is a statute (Act 52 of 1906, as amended by Act 227 of 1916), which declares that every policy of insurance issued by a life insurance company doing business in this state 'shall contain the entire contract between the parties.' The statute was intended, manifestly, not so much to protect the insurance companies as to protect the *policyholders;* for the statute goes further and provides that nothing shall be incorporated in any life insurance policy by reference to any constitution, or by-laws, or rules, or the application for insurance, or any other writing, unless the same be *indorsed upon or attached to the policy when issued;* that all statements purporting to have been made by the insured shall, in the absence of fraud, be deemed representations and not warranties; that no statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless indorsed upon or attached to the policy when issued; and that any waiver of the provisions of the statute shall be void. There is *no reason,* however, why the statute, in so far as it declares that every life insurance policy shall constitute or contain the *entire* contract between the parties, should not be as effective in forbidding the *insured* as in forbidding the *company* to contradict the *written instrument* by *parol* or other *extrinsic* evidence. In *Fisett* v. *Mutual Life Insurance Co.,* 162 La., 620, 110 So. 880, it was held that the Act of 1916 was applicable as well to statements made in an application to establish a policy, or to place it in force after a

failure to pay the premiums within the time required, as to statements made in the original application for insurance."

Iannarelli v. *The Kansas City Life* (West Virginia), 171 S. E. 748:

"There is another reason of primary importance why contractual provisions of this sort in life insurance policies must be interpreted in the light of the phraseology employed and not in the light of extraneous consideration. Life insurance has come to occupy a most important field and to discharge an indispensable function in modern society.

"The life insurance companies are unable to function only on the basis of standard mortality and experience tables. These companies must comply with fixed requirements of State statutes. Neither the actuaries of the companies nor the Insurance Commissioners of the States could determine with any degree of definiteness the liability to which the companies might be subjected at any given date on account of outstanding insurance, if at the same time there are a large number of policies, supposedly lapsed and forfeited, under which there may be liability because of total disability of the insured at the time of the forfeiture, though the insurer had no notice of such disability.

"It must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion.

"It is like the forfeiture of shares in mining enterprises and other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the

whole scheme is endangered. The insured parties are associated in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the co-existence of many risks arises the law of average, which underlies the whole business.

"An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations again are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company."

Therefore, the company may do only the thing that the law says it may do, and only in the manner and way in which the law directs.

The corporation is, therefore, in legal effect only the agent or holding company or the trustee for the policyholders who are the owners of the assets and without any right in the company to exercise free agency or judgment in the manner in which the affairs shall be conducted. All it can do is to carry out the law as written under severe penalties.

The other policyholders are in effect interested parties in all law suits involving policies of the company, and are entitled to have these statutes construed so as to protect their rights.

This being the state of the law regulating your petitioners relation to the plaintiff and to other policyholders, it had no freedom of choice and could not exercise any free judgment

as to what it ought to do or not do when this claim was presented to it at Nashville, Tennessee, as stipulated in the policy.

All that it could do was to examine the claim to see whether or not it was payable under the statutes of Tennessee and Arkansas which required that the claim should show on its face that it was (a) an amount owed by the terms of the policy, and (b) that its payment would not result in a discrimination between policyholders of the same class. If the claim did not meet these two requirements your petitioner was required by these laws to reject it and its payment would have subjected your petitioner to conviction for a misdemeanor and to a cancellation of its license.

As aforesaid, prior to the issuance of this policy, the Tennessee Supreme Court in the Galbraith case had held that the terms of an insurance policy began to run anew from the date of the reinstatement and it will not be disputed that as to Tennessee policyholders this decision became binding and a part of the policy issued thereafter and that if presented by a Tennessee policyholder the claim would not be owed by your petitioner.

The policy provides on its face that the claim is payable at Nashville, Tennessee, and, accordingly, in determining whether or not it owed anything on the claim your petitioner had to apply the Tennessee law to it.

It is equally clear that if the company had paid this claim to a citizen of Arkansas which the law did not permit it to pay to a citizen of Tennessee, it would have constituted a dis-

crimination against the Tennessee policyholders in favor of the Arkansas policyholder forbidden by the above Tennessee statute.

Likewise, such a payment to an Arkansas policyholder which could not be paid to a Tennessee policyholder would be a discrimination under the above Arkansas statute inasmuch as the Arkansas statute does not limit the prohibition as to discrimination to citizens of Arkansas, but generally prohibits discrimination between policyholders of all States. Accordingly, the policy providing on its face under the Galbraith case that this claim showed death by suicide within one year of the reinstatement, the claim was one showing upon its face that this petitioner did not owe it and it was forbidden to pay it both by the Arkansas statute and the Tennessee statute.

Accordingly, under the law as laid down by this Court in the cases of *St. Louis Railroad Company* v. *Wynne*, 224 U. S. 360, 56 L. Ed. 801, and the Arkansas case of *Pacific Mutual Life Ins. Co.* v. *Carter*, 92 Ark. 378, 123 S. W. 384, the petitioner not owing the claim as demanded, no penalty could be awarded against it for its non-payment under the Fourteenth Amendment.

We make no point that 12% damages are excessive or that the attorneys' fees are unreasonable. Our point is that *no attorneys' fees* and *no damages* may be assessed where the claim at the *time demanded* shows that the company does not owe the claim.

This Court omitted to pass upon the merits of the case as contended in appellant's original brief stating "our jurisdic-

tion upon appeal from a judgment of a State Court does not permit us to review them."

This is manifestly in conflict with the case of *Scott* v. *Donald*, 165 U. S. 71, in which the Court said:

> "It is also argued that the amounts involved in the respective suits were not sufficient to give jurisdiction to the Circuit Court. Although the question of the jurisdiction of the court below has *not* been certified to us in the manner provided by the 5th section of the Judiciary Act of March 3, 1891, yet, *as the case is before us*, in a case in which the *law of a State* is *claimed to be in contravention of the Constitution of the United States*, under another clause of that statute, we have jurisdiction of the *entire case* and of *all questions involved in it*. *Horner* v. *United States*, 132 U. S. 570 (36:266); *Carey* v. *Houston & T. C. R. Co.*, 150 U. S. 181 (37:1044); *Chappell* v. *United States*, 160 U. S. 499 (40: 510)."

In these cases now before the Court, the Court has sustained its jurisdiction on the ground that it involved the claim that the Arkansas penalty statute was *in conflict with the Constitution of the United States* and *has passed on that question*. Accordingly, under the above authority, the merits of this case are now before the Court.

Also, in order to pass upon the questions herein raised that the claims as presented at the time of the demand were not owed, the decision on the merits is directly involved.

The authorities cited by the Court either do not relate to the questions here discussed, or the conclusion reached, except the case of *St. Louis, etc., Railroad Company* v. *Wynne*, 224

U. S. 354, hereinbefore mentioned, which holds that where the statute required a *demand before suit* and then demand shows the amount not due or owing, although suit may be brought without making another demand, no penalty can attach, under the Fourteenth Amendment. This case sustains our contention in every point and must be overruled if this petition is to be denied.

We concede, of course, that an insurance company has such a relation to the public as authorizes its regulation. As a matter of fact, our whole contention is based upon the proposition that they are not only regulated but that they are in a straight-jacket. The law directs in every way every step pertaining to their business.

We also concede that statutes may provide for the taxing reasonable attorney's fees as costs in cases, but we are sure that this Court will agree that a statute would offend the Fourteenth Amendment if it provided for attorneys' fees against the defendant when unsuccessful and not against the plaintiff when unsuccessful, unless the defendant occupied such a relation to the public as to give the defendant an unequal advantage. In the present case it has been seen that the real contest in insurance cases is not between the plaintiff and the company but between the plaintiff as one policyholder against the other policyholders who are owners of the assets and who will be directly affected by an unequal distribution not in accordance with their insurance policies.

All of these insurance laws, including the ones requiring that no claim shall be paid unless shown to be due by the written policy and where it discriminates against other policyholders of the same class, become a part of each insurance

contract, and the policyholder bringing suit has thereby agreed in its policy that he will not be entitled to draw out of this common fund any amount not shown by the written provisions of the policy and which discriminates against the other policyholders. Where such a policyholder as plaintiff in violation of his contract as created by these statutes brings a suit attempting to secure for himself a greater part of this common fund than his contract calls for and thereby subjects the common fund to the expense of the litigation, he stands upon the same footing as the other policyholders, and accordingly the Arkansas statute is unconstitutional as not placing the same burden upon the offending policyholder as it placed upon the common fund owned equally with the other policyholders. As we have before stated, the relation of the company to these matters is merely that of agent or trustee to see that the law regulating such matters including the distribution of the fund is faithfully and in good faith carried out.

The cases relating to penalties and damages against railroad companies are not applicable. The difference between a railroad company and an insurance company in this respect is that the relation of the railroad to the public is one-sided. While it owes the duty to pay just claims, it owns its own assets; it has the right to contract as it sees fit and to reject any claim and stand suit whenever it pleases. An insurance company's relation to the public is dual; it not only owes the duty to pay just claims, but the statutes of the different States specifically state what claims *are just and what claims are not to be paid.* The insurance companies have no freedom of judgment as to what contracts they make as their policies are purely statutory and must be approved by the Insurance

Departments before issuance, and must be carried out as written.

The cases of *Fidelity Mutual Association* v. *Mettler*, 185 U. S. 308, 325, 326, and *Iowa Insurance Company* v. *Lewis*, 187 U. S. 335, and *Farmers and Merchants Insurance Company* v. *Dodney*, 189 U. S. 301, involve the Texas statute imposing attorney's fees and penalty not exceeding 12% upon an insurance company relating to their failure to pay claims. If this Court will examine these cases again, it will see that this Court decided them upon two propositions, neither of which are involved in this case:

1. That an insurance company being a foreign corporation has no right in the State without the consent of the State and accordingly any condition whether constitutional or not may be imposed upon it. This view has been expressly overruled in *Terral* v. *Burke Construction Company*, 257 U. S. 529, and *Mortensen* v. *Security Ins. Co.*, Advance Sheets, U. S. Reports, Vol. 77, No. 11, 673.

2. That the contention that the attorneys' fees and damages could not be assessed against an insurance company on account of an unlawful classification was not sound because the insurance company differed from other corporations in its relation to the insuring public.

We are making no such contention as an insurance company's relation to the insuring public makes it subject to a different classification.

While these cases may have in a general way expressed an approval of the opinions of the Texas Court, such observations were not pertinent to the points ruled on by this Court.

ALBERT BAREFIELD CASE

What we have said heretofore has been particularly applied to the facts in the McCray case, but they are equally applicable to the facts in the Barefield case. The claim as demanded before the suit was filed in the Barefield case showed that your petitioner owed nothing because the claim did not come within the written provisions of the policy, and, while the stipulation in this case states that the policy was an Arkansas contract, this point is not material because the law of Arkansas and of Tennessee are the same as applied to these facts. The policy in the Barfield case expressly provided that there would be no liability under the policy unless the accident to the automobile left some "external or visible injury on the vehicle of the collision or accident." The claim as demanded did not show that there was any external or visible injury to the automobile. The declaration as filed did not aver that there was any visible or external injury to the automobile. The stipulation did not set out that there was any external or visible signs of the injury to the automobile.

Consequently, the claim did not come within the terms of the policy. The Arkansas Supreme Court held that this provision while valid was an excepted cause and consequently the burden of proof was upon the defendant to show the negative fact of no external or visible injury to the automobile. Manifestly this position is not sound. The case being heard upon stipulation, the question of burden of proof was not involved. The parties had agreed upon certain facts and submitted to the Court those facts on the question of liability under the policy, and all the Court could consider was those facts as set out in the stipulation. The law presumes that in

making up stipulations and submitting them to a Court for determination that each has placed therein every fact available, and where a fact is omitted the presumption is that no such fact existed. (*Birmingham Post Company* v. *Sturgeon* [Ala. Supreme Court] , 149 So. 74, No. 1, Advance Sheets, July 27, 1933.)

Accordingly the claim as presented at the time of the demand not showing a visible or external injury on the automobile, did not show that it was owed by your petitioner, and under the statutes heretofore set out, it would have been unlawful for your petitioner to pay it.

Also owing nothing on the claim at the time of the demand, under *St. Louis, etc., Railroad Company* v. *Wynne*, 224 U. S. 354, and *Pacific Mutual* v. *Carter*, 92 Ark. 378, no award for attorney's fees and damages could be awarded under the Fourteenth Amendment.

SUMMARY

1. This Court has held in *St. Louis, etc., Railroad* v. *Wynne*, supra, and *Pacific Mutual Life* v. *Carter*, supra, that where a statute provides that a demand must be made as does the Arkansas penalty statute, the Fourteenth Amendment forbids the award of attorney's fees and penalties for failure to pay the claim if the claim as demanded shows that the company does not owe it. In other words, whether or not the refusal was wrongful depends upon whether or not at the time of the demand the claim presented showed an amount owed by the company. This is our exact contention in these cases.

2. Insurance is an exact science made possible by the phenomena of human experience that so many deaths and so

many accidents will occur under given circumstances, which have enabled actuaries to figure definitely insurance tables adjusting the premium charged to the liability covered. In order to carry out the science of insurance it is necessary to create insurance reserves by charging more than sufficient to cover current losses and these reserves, constituting substantially the entire assets of an insurance company, *belong to the policyholders.* It would defeat the entire scheme of insurance if the law permitted one policyholder to be paid out of this reserve fund more than his policy entitled him to and consequently each State has passed laws regulating not only the payment of claims but the manner and means of distribution, how the reserves shall be created, and generally an entire regulation of insurance business. These laws must necessarily apply to the policyholders generally over the different States and none of them limit their application to the citizens of one State. These insurance laws become a part of each policy and accordingly each policyholder *agrees* that he will *pay* into this general fund to a *certain proportion* and that he will *draw out* of this common fund in a *certain proportion.* Whenever a policyholder brings suit demanding more than his policy calls for, he is violating his agreement as evidenced by these insurance laws. He is charged with knowledge not only of what his policy contains but also the meaning of his policy with these laws read into it. Accordingly, it is unfair to the other policyholders, and actually forbidden by these statutes, for the company to pay out to such policyholder amounts not due, that is, more than is due, or an amount not owing under his written policy. Accordingly, the real controversy in every insurance law suit is not between the policyholder suing and the company, but between *such policyholder* and *every other policyholder* of the company, which is merely a holding agency or trustee for the distribu-

tion of the reserve funds under these fixed and inflexible statutes.

3. This Court ought to pass upon the merits of these two cases (a) because it is necessary to determine whether or not the claim as demanded was owed by the company. If as demanded it was owed, then the application of the penalty and attorneys' fees was proper. If it was not owed at that time, the Fourteenth Amendment forbade the addition of attorneys' fees and damages. Accordingly the merits were directly involved in this constitutional question. (b) This Court has held in *Scott* v. *Donald,* 165 U. S. 71, that where the constitutionality of a State statute is involved the merits of the case, and every question in it, are before the Court for determination. In these cases the Court has sustained the proposition that the constitutionality of the Arkansas penalty statute is directly involved, and accordingly under the above cases the merits of the question are also before the Court.

4. On the merits of the question in these cases, we say that in the McCray case the claim as demanded showed no amount due because the suicide occurred within one year from the date of the reinstatement, and the policy provided expressly on its face, reading into it the interpretation of the Tennessee Supreme Court in the Galbraith case, that suicide within one year from the date of the reinstatement precluded recovery.

In the Barefield case the claim as demanded showed no amount owed under the policy because it failed to show that the accident left an *external or visible* sign on the automobile. This provision of the policy is just as essential as any other in order to keep the premium charged

within the liability under the policy, and it can no more be disregarded than may any other provision of the policy.

5. In the case of *Woodson* v. *Railroad*, 134 U. S. 614, this Court held that the judgment of the Supreme Court of Tennessee was void and unconstitutional under the Fourteenth Amendment because there was no evidence in the record to support it, and in the McCray case the only evidence was the policy, the fact that the assured committed suicide within one year from the reinstatement and the Tennessee and Arkansas Statutes forbidding the payment of claims not coming under the written policy and which discriminated between policyholders of the same class. This shows no evidence of liability whatever. In the Barefield case the only evidence was the policy, the death of the party in an automobile accident, with absolutely no evidence that there was any external or visible signs of injury to the automobile as required by the policy. Accordingly, there is no evidence whatever of liability.

If the Woodson case is to be given application, these cases certainly come within the law as therein set out.

6. At the time that the demand was made in the McCray case the Supreme Court of Arkansas had not passed upon the question of whether or not a reinstated policy became a new contract and that all of its terms began to run anew from the date of the reinstatement and not the date of the policy. The cases of *New York Life Ins. Co.* v *Adams*, 151 Ark. 123; *Security Life* v. *Leeper*, 171 Ark. 77, and *Equitable Life* v. *King*, 178 Ark. 293, did not discuss this proposition at all but held that where a policy lapsed and was reinstated the company had no right to add new conditions in the reinstatement.

Accordingly, the only case on the question at that time was the Galbraith case, which of course was binding upon your petitioner. The fact also is that the policy on its face (Record page 4) shows that the demand must be made at Nashville, Tennessee, and, of course, the Tennessee law would govern your petitioner and compel a rejection of the claim, as petitioner is a Tennessee corporation.

7. The fact that a judgment is rendered on a policy has no bearing on the application of the Arkansas penalty statute. While a statute requires that a demand be made before suit the law does not hold the claimant to the facts set out in the demand, but he may shift his ground entirely and may even deny the facts set out in the demand. The law does not require the claimant to make a new demand after the first is refused nor to alter or amend it. Consequently, the claimant may make the demand and when it was refused, sue on an entirely different state of facts and recover. This is manifestly contrary to the Fourteenth Amendment as the company has not been given the opportunity to pay the claim upon which the judgment is based.

This was expressly held by this Court in the case of *St. Louis Railroad Company* v. *Wynne*, supra, and by the Supreme Court of Arkansas in the case of *Pacific Mutual Life* v. *Carter*, supra.

8. The judgment of the Arkansas Supreme Court is void and unconstitutional under the Fourteenth Amendment as it is without power to render a judgment, the enforcement of which compels your petitioner to violate the above statutes

of Tennessee and Arkansas by paying claims not shown by the written policy and the payment of which would discriminate between policyholders of the same class, and which would subject your petitioner to a conviction for misdemeanor and to have its corporative existence ended and to have its license cancelled.

It may be that such judgment would be a protection against it in Arkansas but it certainly would not be a protection against it in Tennessee where it is incorporated or in the other States where it does business. It would be a gross injustice and a denial of their constitutional rights of the other policyholders if the Supreme Court of Arkansas were permitted to favor the citizens of Arkansas by compelling by judgment and execution, the payment to its citizens amounts under their policies which are not provided or authorized by the written policy and which would discriminate against policyholders of the other States. This would be permitting the citizens of Arkansas to receive out of the reserve funds of your petitioner amounts not shown by their written policy and which constitute a discrimination against other policyholders. The result of this would be the entire disruption of the science of insurance.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgments, upon further consideration, be reversed.

These two cases are included in one petition under the authority of a letter received from the Clerk of this Court under

date of March 12, 1934, advising that this was permissable under the rules of this Court.

All italics are ours.

Respectfully submitted,

MOREAU P. ESTES,
P. M. ESTES,
MYRON T. NAILLING,
Counsel for Petitioner (Appellant)
Life & Casualty Insurance
Company of Tennessee.

I, Moreau P. Estes, counsel for the above-named petitioner, Life & Casualty Insurance Company of Tennessee, do hereby certify that the foregoing petition for a rehearing of these causes is presented in good faith and not for delay, and that a copy of this petition has been mailed, with postage paid, to adversary counsel.

MOREAU P. ESTES,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 89.—October Term, 1933.

Life & Casualty Insurance Company of Tennessee, Appellant, *vs.* Ossie McCray, Appellee. } On Appeal from the Supreme Court of the State of Arkansas.

[March 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

On March 3, 1930, the appellant, an insurance company, issued to Jonas McCray a policy of life insurance for $500 payable to his wife, the appellee in this court. The policy lapsed in June, 1931, for non-payment of a premium within the period of grace, but in August, 1931, it was reinstated with the company's consent. On May 10, 1932, the insured committed suicide. If suicide occurred within a year from the date of issue of the policy, the insurer's liability was limited to a return of any premiums paid by the insured. If suicide occurred after the expiration of the year, the liability was the same as upon a death from other causes. The appellee made proof of claim against the insurer, insisting that the year was to be calculated from the original date of issue. The company refused payment upon the ground that the year was to be calculated from the time of reinstatement. Judgment went against the insurer in the trial court, and again, upon appeal, in the Supreme Court of the State. — Ark. —, 58 S. W. (2d) 199. The controversy here grows out of the amount of the recovery. To the face of the policy with interest at six per cent there were added certain statutory allowances, which are contested in this court. One of the additions was an attorney's fee of $200 ($100 for the trial and $100 for the appeal). The other was an award of twelve per cent computed on the payments due under the contract. These increments are authorized by a statute of Arkansas which is quoted in the margin.[1] The insurer contests the validity of the

[1] Section 6155, Digest of the Statutes of Arkansas (Crawford & Moses, 1921): "In all cases where loss occurs, and the fire, life, health, or accident insurance company liable therefor shall fail to pay the same within the time specified

statute, insisting that it is condemned by the Fourteenth Amendment. The case is here upon appeal.

1. The Fourteenth Amendment does not prohibit the award of an attorney's fee, moderate in amount, when payment of a policy of life insurance has been wrongfully refused.

We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so, the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmakers may include the fees of an attorney. There are systems of procedure neither arbitrary nor unenlightened, and of a stock akin to ours, in which submission to such a burden is the normal lot of the defeated litigant, whether plaintiff or defendant. The taxing master in the English courts may allow the charges of the barrister as well as the fees of the solicitor.[2] Nothing in the Fourteenth Amendment forbids a like procedure here. The assurance of due process has not stereotyped bills of costs at the rates known to the Fathers. *Chicago & N. W. Ry. Co.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35; *Dohany* v. *Rogers*, 281 U. S. 362, 368. Nor is there an unjust discrimination, an arbitrary denial of the equal protection of the laws, in laying the burden on insurers and not on all defendants. Diversity of treatment in respect of the costs of litigation has its origin and warrant in diversity of social needs. *Dohany* v. *Rogers, supra.* Dependents left without a breadwinner will be exposed to sore distress if life insurance payments are extracted slowly and painfully, after costly contests in the courts. Health and accident insurance will often be the sources from which the sick and the disabled are to meet their weekly bills. Fire insurance moneys, if withheld, may leave the business man or the householder without an office or a home. Classification prompted

in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fee to be taxed by the Court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other costs are or may be by law collected."

[2]The practice under the law of England is explained clearly and fully by Arthur L. Goodhart in the article "Costs" in his "Essays in Jurisprudence and the Common Law", pp. 190, 198-201, first published in 38 Yale Law Journal 849.

by these needs is not tyrannical or arbitrary. As to that, the judgments of this court in situations precisely apposite have set a closure to debate. *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308; *Iowa Life Insurance Co.* v. *Lewis*, 187 U. S. 335; *Farmers & Merchants Insurance Co.* v. *Dobney*, 189 U. S. 301.

2. The Fourteenth Amendment does not prohibit a fixed award of damages, moderate in amount, in addition to the costs and the fees of the attorney, when the payment of a policy of life insurance has been wrongfully refused.

The appellant concedes that such an allowance is permissible when the refusal to pay is wanton or malicious. *Fraternal Mystic Circle* v. *Snyder*, 227 U. S. 497. The argument is that the allowance is to be condemned as a denial of due process when the defense is in good faith and on grounds not wholly frivolous. We find a different meaning in the Constitution and the precedents. The same social needs that sustain the award of an attorney's fee when payment is resisted, sustain in like circumstances an increment to the policy within the bounds of moderation. This is not a case where the increment has been authorized after the writing of the policy. The statute was enacted in 1905, and the insurance was written in 1930. Here at the delivery of the policy, the insurer was informed that if it failed to make payment in accordance with its contract, "twelve per cent damages" would be owing to the insured. We discover nothing arbitrary or oppressive in imposing such a contract upon the business of insurance, a business subject, as all agree, to control and regulation. *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U. S. 151; *O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co.*, 282 U. S. 251. There has been no failure to give heed to "the rudiments of fair play" (*Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt*, 232 U. S. 165, 168), as there was in *St. Louis, I. M. & S. Ry. Co.* v. *Wynne*, 224 U. S. 354, where the damages were imposed though the insured had rejected a tender of what was due and had made demand for more, or in *Polt's* case (*supra*), a suit against a railroad for loss of property destroyed by fire where the damages were unliquidated and yet the recovery was to be doubled if the verdict exceeded by a penny what was offered by the wrongdoer. To nullify this statute the appellant must be able to show that an award of twelve per cent is so extravagant in amount as

to outrun the bounds of reason and result in sheer oppression. This we cannot bring ourselves to say in the face of a contrary finding by the framers of the statute, with all the presumptions of correctness attaching to their judgment. Still less can we bring ourselves to say it in the face of kindred statutes in force in other states.

The legislation now challenged is a sample of a type. Statutes very similar have been adopted in Texas, Arizona, Louisiana, and South Dakota. The Texas act, like this one, calls for damages of 12% in addition to attorney's fees. Texas Revised Civil Statutes, 1925, Art. 4736. In Arizona, the increment is as high as 15%, though it is limited to policies of insurance against fire. Arizona Revised Code, 1928, § 1828. In Louisiana, the percentage for fire policies is 12% and 25% for fire and theft losses affecting automobiles. Louisiana General Statutes, 1932, §§ 4179, 4246. In South Dakota there is an increment of 10%, confined to loss by fire. South Dakota Compiled Laws, 1929, § 9195.

These statutes and others not unlike them have been considered by this court without complaint or suggestion that the percentage was too high. Thus, in *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, 325, 326, the Texas statute was before us. Carried forward now into the revised codes, it was enacted for the first time in 1879. The attack upon its validity was confined to its discriminatory features, the burden being laid upon some forms of insurance, though inapplicable to others. This court upheld the act as valid, and in so doing repeated with apparent approval the ruling of the Supreme Court of Texas (86 Tex. 654) that the twelve per cent was given as damages for the failure to comply with the contract by payment, and the fee as compensation for the cost of collection. 185 U. S. at p. 325. During the half century and more in which the act has been in force, no one, it seems, has protested to any court that the percentage is immoderate. The same statute came before us again in *Iowa Life Insurance Co.* v. *Lewis*, *supra*, at p. 355. We renewed our approval, and said of our earlier opinion (*Fidelity Mutual Life Association* v. *Mettler*): "We are . . . entirely satisfied with the case and its reasoning." p. 355. Cf. *Farmers' & Merchants Insurance Co.* v. *Dobney*, *supra*, at p. 305. The presumption of validity which applies to legislation generally is fortified by acquiescence continued through the years. *Corn Exchange Bank* v. *Coler*, 280 U. S. 218; *Ownbey* v. *Morgan*, 256 U. S. 94.

The argument is made that the statutory percentage, though it might be legitimate as an award of damages, is illegitimate if intended as a penalty, a clog upon the privilege of access to the courts. The statute speaks of it as "damages." There are places here and there in the opinions of the Supreme Court of Arkansas where the word penalty is used. *Arkansas Insurance Co.* v. *McManus*, 86 Ark. 115, 124, 125; *Security Insurance Co. of New Haven* v. *Smith*, 183 Ark. 255, 258; *Mutual Life Insurance Co.* v. *Marsh*, 185 Ark. 322. How little weight is to be given to this use is perceived when we discover that upon one page of an opinion the percentage is spoken of as a penalty and on another page of the same opinion is described as an award of damages. See *Arkansas Insurance Co.* v. *McManus, supra*, with its quotation from *Seaboard Air Line Ry. Co.* v. *Seegers*, 207 U. S. 73, 77. There is little doubt that the terms were thought of as equivalents.

The result will not be changed, however, though the increment to the judgment be classified as penal, if the amount is not immoderate. The measure, not the name, controls. The insurer is not penalized for taking the controversy into court. It is penalized (if penalty there is) for refusing to make payment in accordance with its contract, and penalized in an amount that bears a reasonable proportion to the loss or inconvenience likely to be suffered by the creditor. Repeated judgments of this court bear witness to the truth that such a tax upon default is not put beyond the pale by calling it a penalty. Thus, in *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, the court had before it a Mississippi statute whereby a common carrier was required to settle claims within a stated time. If this was not done, there was to be a liability to the consignee for "twenty five dollars damages in each case, in addition to actual damages," whenever the amount of the claim was two hundred dollars or less. This court upheld the additional exaction though describing it as a penalty. The statute did no more than provide "a reasonable incentive for the prompt settlement without suit of just demands," and demands "of a class admitting of special legislative treatment." Cf. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Polt, supra*, p. 168. In *Seaboard Air Line Railway* v. *Seegers, supra*, the penalty for delay was fifty dollars, and the court was not deterred by the label from enforcing the statute and adjudging its validity. There was approval of the statement of the court below that "the penalty,

in case of a recovery in court" would operate "as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for . . . trouble and expense". More recently, in *Chicago & N. W. Ry. Co.* v. *Nye Schneider Fowler Co., supra,* a statute of Nebraska prescribing the liability of carriers imposed a charge of seven per cent on the amount of the recovery as well as reasonable attorney's fees. We held that "a reasonable penalty" (pp. 43, 45) might be assessed against the wrongdoer as a stimulus to settlement without vexatious delay.

"Penalty" is a term of varying and uncertain meaning. There are penalties recoverable in vindication of the public justice of the state. There are other penalties designed as reparation to sufferers from wrongs. *Huntington* v. *Attrill,* 146 U. S. 657, 668; *Brady* v. *Daly,* 175 U. S. 148, 154, 157; *St. Louis, I. M. & S. Ry. Co.* v. *Williams,* 251 U. S. 63, 66; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 103.[3] One who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal. It is no answer in such circumstances that he has acted in good faith. "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *United States,* 229 U. S. 373, 377. Reparation may still be due, for all his good intentions, yet reparation within bounds. It is all "a question of more or less." *Sexton* v. *Kessler,* 225 U. S. 90, 98. The price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open. *Ex parte Young,* 209 U. S. 123; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 661, 662. On the other hand, the penalty may be no more than the fair price of the adventure. *St. Louis, I. M. & S. Co.* v. *Williams, supra,* p. 66. In that event, the litigant must pay for his experience, like others who have tried and lost.

3. Other objections affecting the merits of the recovery have been put before us by the appellant in briefs and in oral argument.

[3]Often the recovery is fixed at an unvarying amount because of the difficulty of proving damages with accuracy in varying situations. Brady *v.* Daly, *supra;* Chatterton *v.* Cave, 3 App. Cas. 483, 492; Cox *v.* Lykes Bros., 237 N. Y. 376, 379; Calvin *v.* Huntley, 178 Mass. 29, 32.

Our jurisdiction upon appeal from a judgment of a state court does not permit us to review them.

4. To the extent that *Standard Accident Insurance Co.* v. *Rossi,* 35 F. (2d) 667, and *Inter-Southern Life Insurance Co.* v. *McElroy,* 38 F. (2d) 557, are inconsistent with this opinion, we are unable to approve or follow them.

The judgment is

Affirmed.

Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER dissent in respect of the 12% penalty or damages.

A true copy.

Test:

Clerk, Supreme Court, U. S.